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H – 1243

International Court of Justice

H1243 – 0001

Doenitz
English

# CLOSING ARGUMENTS

for the defense of

Grand-Admiral Karl D o e n i t z

and for the defense of Grand-
Admiral Erich R a e d e r
with regard to questions of naval warfare

before the

International Military Tribunal

in Nuernberg

held by

Otto K r a n z b u e h l e r

Judge of the Fleet

July 1946

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"War is a cruel thing and it brings in its train a multitude of injustices and misdeeds."

With those words of Plutarch's, Hugo Grotius begins his examinati of the responsibility for war crimes and they are as true today as they were 2000 years ago. At all times acts were committed by belligerents, which were war crimes or were considered as such by the other side. But the conclusions drawn from this fact were always to the prejudice of the vanquished parties, and never to that of the victors. The law which was applied here was necessarily the right of the stronger.

While in land wars more or less steadfast rules were drawn up regulating warfare, in maritime wars the conceptions of the parties engaged have always clashed on the point of internationa law. Nobody knows better than British statesmen how much these conceptions are dictatated by national or economic interests.

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I refer in this respect to noted witnesses such as Lord Fisher and Lord Edward Grey *. Therefore, if ever in history a naval power would have had the idea to prosecute a defeated enemy admiral, namely on grounds of his own conception of the rules of naval warfare, the sentence would have been pronounced simultaneously with the indictment.

At this trial two admirals are under indictment for a naval war, which has been called criminal. Thus the Tribunal is confronted with a decision regarding conceptions of law, which are necessarily as divergent as the interests of a naval power from the interests of a land power. Not only the fate of both admirals is connected with this decision. It is also a question of an honorable name for hundreds of thousands of German seamen, who believed in serving a good cause and do not deserve to be branded by history as pirates and murderers. It is to those men, the living as well as the dead, that I feel bound by duty when I undertake to reject the accusation against German naval warfare.

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* Lord Edward Grey. "25 Years of Politics, 1892 - 1916". Translation by Brueckmann, Munich 1926. "International Law has always been elastic.... A belligerent with an overpowering navy has always advocated an interpretation of international law, justifying the maximum seizure of goods which may presumably reach the enemy. That viewpoint was naturally taken by Great Britain and the Allies due to their superiority at sea. The British attitude in this respect has not always been the same. When we were among neutrals, we naturally contested the right the belligerents claimed for themselves to make vast seizures."

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Which are these accusations? They are divided into 2 large groups: unlawful sinking of ships and premeditated killing of shipwrecked personnel.

I shall deal first with the accusation of the illegal sinking of ships.

Two reports by Mr. Roger Allen of the British Foreign Office, made in the fall of 1940 and spring of 1941 form the nucleus of that accusation I do not know to whom and for what purpose these reports were made. According to their form and contents they seem to be serving propaganda purposes, and for this very reason I believe their value as evidence to be low. Even the prosecution submitted only part of the accusations made therein. The reports trace only 1/5 of the total of supposedly unlawful attacks to submarines whereas 4/5 are ascribed to mines, airplanes or surface craft. The prosecution omits these four fifths and this reserved attitude may be explained from the fact that the use of these combat means on the British side differs in no way from that on the German side.

With regard to the commitment of submarines there seems to exist a difference between the principles followed by the German Naval Operations and those of our enemies. At any rate the public in enemy countries and many neutral countries believed so during the war and partly still believes it today. Propaganda dominated the field. At the same time the mass of all critics neither knew exactly which principles were valid for German U-boat warfare, nor

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on which factual and legal foundations they were based. It shall be my task to attempt to clarify this.

The reports by Mr.Roger Allen culminate in the assertion tha the German U-boats from the summer of 1940 on torpedoed everythir coming before their periscopes. Undoubtedly the methods of subma warfare stiffened gradually under the pressure of the measures directed against Germany. This war, however, never did degenerate into a wild shooting melee governed by the law of expediency alon much of what might have been useful for a U-boat was left undone until the last day of the war because it had to be regarded as legally inadmissible, and all measures which the German Naval High Command is being accused of today by the prosecution, were the result of a development in which both sides partook through measures and counter measures as in all military developments.

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The London Protocol of 1936 formed the legal basis for the German submarine warfare at the beginning of this war. These regulations were literally incorporated into article 74 of the German Prize Ordinance, which even Mr. Roger Allen calls a reasonable and not inhumane instrument. As a draft this prize ordinance was sent in 1938 to the two U-Boat flotillas and to the U-Boat training school and served as foundation for the training of the commanders. Stopping and examining of merchant vessels was performed as a tactical task. In order to facilitate for the commander in economic warfare the quick and correct evaluation of his legal position towards a ship and the cargo of the enemy and the neutral, the prize disc was constructed which through simple manipulations indicates the articles of the prize ordinance to be applied. Insofar as preparations had been made at all for economic warfare through submarines they were based exclusively on the German prize ordinance and thus on the London Protocol.

The German High Command actually adhered to this legal foundation at the time the war broke out. The combat instructions for U-Boats of 3 September 1939 ordered clearly and distinctly that submarine warfare be carried on in accordance with the prize ordinance. Accordingly sinkings were permissible only after stopping and examination unless the ship attempted to escape or offered resistance. Some examples were submitted to the Tribunal from the abundance of possible instances showing the chivalrous spirit with which the German submarine commanders complied with the issued instructions. Especially the care given to the crews of ships sunk lawfully after stopping and examination was carried out in part to an extent which

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could scarely be/justified on military grounds. Life boats were towed over long distances and, thereby, the few available U-boats were diverted from their combat mission. Enemy ships which could have been sunk lawfully were permitted to go free in order to send the crews of ships previously sunk to port abroad them. It is, therefore, only correct if Mr. Roger Allen states that the German U-Boats during the first weeks of the war adhered strictly to the London regulations.

Why was this procedure not kept up? Because the conduct of the enemy made such a procedure militarily impossible and created at the same time the legal prerequisites for its modification.

I shall consider the military side first. From the very day the war/started, U-Boat reports reached the commander of the U-boat fleet at the Naval High Command stating that hardly an enemy ship submitted voluntarily to stopping and examination. The merchant vessels were not content with their attempt to escape, be it through fleeing or be it by changing their course, to bear directly upon the U-boat thus forcing it to dive. On the contrary, every sighted U-boat was reported at once by radio and subsequently, in the shortest space of time, it was attacked by enemy air planes or naval forces. The complete armament of the enemy merchant vessels, however, settled the matter. As early as 6 September 1939 a German U-boat was shelled by the British Steamship "Manaar" and that was the starting signal for the great struggle which took place between the U-boats on the one hand and the armed merchant vessel equipped with guns and depth charges on the other hand, as equal military opponents.

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In order to show the effect of all these measures taken by the adversary, I have presented the Tribunal with some examples which I do not wish to repeat. They unequivocally show that a further action against enemy merchant ships according to the regulations governing Prize Ordinance was no longer possible from the military standpoint and meant suicide for the submarine. Nevertheless the German High Command continued, for long weeks, to proceed according to the regulations governing Prize Ordinance. Only after it was established that every time there was any action on the part of enemy merchant ships, and especially of armed action, it was not a question of an individual case but generally of a / ordered measure, the order was given on 4 October 1939 to attack all armed enemy merchant ships without warning.

The Prosecution will perhaps take the standpoint that in lieu of this, submarine warfare against armed merchant vessels should have been discontinued. In the last war the most terrible weapons of warfare were ruthlessly employed on both sides both on land and in the air. In view of this experience, the thesis, can hardly be upheld today that in naval warfare one of the parties waging war can be expected to give up using an effective weapon after the adversary has taken measures making the use of it impossible in its previous form. In any case, such a renunciation could only be considered if the novel utilization of the weapon were undeniably illegal. But this is not the case for the utilization of German submarines against enemy merchant shipping, because the measures taken by the enemy did not only change the military situation but also the legal one.

According to German legal opinion, however, a ship which is equipped and utilized for battle does not come under the provisions granting protection against sinking without warning, as provided by the London Pact for merchant ships. I wish to stress the fact that the merchant ship is not thereby denied the right to carry weapons and to fight. From this fact I merely draw the conclusion reflected in the well-known formula: "He who uses weapons himself must expect weapons to be used against him."

During the cross-examination the prosecution referred to this interpretation of the London Protocol as dishonest. It admits only the closest literal interpretation and considers the sinking of a merchant ship as admissible only if the latter has offered active resistance. It is not the first time that fundamental differences of opinion exist between contracting parties, with respect to the interpretation of a treaty, and the extremely different interpretations of the meaning of the Potsdam Agreement of 2 August 1945 provide a very timely example. Diversity of conception therefore does not allow for the conclusion that the one or the other party has acted dishonestly during the signing or the subsequent interpretation of a treaty.

I will endeavour to show how unjustified this reproach is in respect also of the German interpretation of the London Submarine Protocol.

There are two concepts which are at the basis of the German interpretation, namely that of "merchant vessel" and "offer of active resistance".

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If I now consider some legal questions, it will not represent a comprehensive expose. I can only touch the problems and due to lack of time I must also limit myself when mentioning scientific sources. I shall preferentially refer to American sources, because the interests of naval strategy of this nation were not fixed to the same extents as those of the European nations and therefore its science can probably claim greater objectivity.

The text of the London Protocol of 1936 is based, as is well-known, on a declaration which was signed at the London Naval Conference of 1930. The committee of jurists appointed at that time, expressed its opinion concerning the greatly disputed definition of a merchant vessel in the report of 3 April 1930:

> "The committee wishes to place on record that the expression "merchant vessel" where it is employed in the declaration is not to be understood as including a merchant vessel which is at the moment participating in hostilities in such a manner as to cause her to lose her right to the immunities of a merchant vessel"

This definition clarifies at least the one thing, that by no means every vessel, flying a merchant flag, may lay claim to being treated as a merchant vessel in the sense of the London agreement. Beyond this, the explanation has few positive aspects because the question of by which kind of participation in hostilities a vessel looses her right to the immunity of a merchant vessel

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is again subjected to the interpretation of the individual contract parties. The London Conference, as far as I can see, did not consid this ticklish question any further and one probably does not go wrong by assuming, that this astonishing reserve is based on experiences which the same powers had gathered in Washington 8 years ago.

The Washington conference of 1922 was still under the impressi of the first world war and, therefore, it is no wonder that the nav power, Great Britain, which during the world war had suffered most from German submarine warfare, now tried to outlaw and abolish altogether by International Law the submarine warfare against merchan shipping. The resolution named after the American main delegate Roo which in its first part substantially corresponded to the London te of 1930, served that aim. But in the second part the Root-Resolution goes further and stipulates that any commander, who -no matter whet he acted with or without higher order- violated the rules establish for the sinking of merchant vessels should be punished as war criminal like a pirate. Finally it was recognized, that under the conditions stipulated in the resolution submarine warfare against merchant shipping was impossible, and was therefore renounced altogether by the contracting powers. The Root-Resolution designates these principles as an established part of international law. As such it was accepted by the delegates, but none of the 5 participating naval powers, USA, England, France, Japan, and Italy ratified it.

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A propos of the Root - Resolution, however, another question was discussed, which is of the greatest importance for the interpr ation of the London Protocol, namely the definition of the word "m 'vessel". Here the two fronts in the entire U-boat question becam clearly evident. On the one side there stood England, on the other France (x), Italy, and Japan, while the US took the position of a mediator. According to the protocol of the Washington conference the Italian delegate, Senator Schanzer, initiated the advance of weaker naval powers by expressly emphasizing that a merchantman regularly armed may be attacked by a submarine without preliminari In a later session Schanzer repeated his statement that the Itali delegation applied the term of "merchantman" in the resolution onl to unarmed merchant vessels. He explicitly declared this to be in accordance with the existing rules of International Law.(xx)

The French delegate, M. Sarraut, at that time received instru ion from the Foreign Minister Briand to second the reservations o the Italian delegate (xxx). He thereupon moved to have the Italia reservations included in the records of the session.

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(x) Yamato Ichihaslie, The Washington Conference and After, Standf University Press, Cal.1928, page 80 "The chief reason for the British plea was the apprehension of the craft in the hands of the French navy.

(xx) Conference on the Limitation of Armaments, Washington, Novembe 12, 1921 - February 6, 1922, pp.606, 688, 692.

(xxx) French Yellow Book, La Conference de Washington, page 93.

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The Japanese delegate Hanihara supported this trend with the statement that he thought it was clear that merchant vessels engaged in giving military assistance to the enemy, ceased in fact to be merchant vessels. (x)
It can, therefore, be seen that in 1922, 3 of the 5 powers represented expressed the opinion that armed merchant vessels should not be regarded as merchant vessels in the sense of the agreement.
Since the whole resolution threatened to collapse because of this difference of opinion, a way-out was found which is typical for conferences of this kind. Root closed the debate with the statement that in his opinion the resolution held good for all merchant ships as long as the ship remained a merchant vessel. (xx) With this compromise a formula was created which, to be sure, could represent a momentary political success, but which, however, would carry no weight in the case of war. For it was left to every participating power to decide whether or not it would grant the armed merchant vessels the protection of the resolution in case of war.
I have described these events of the year 1922 a little more in detail because the same powers took part in them as participated in the London Naval Conference of 1930. The London conference was the continuation of the Washington Conference and what

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(x) Protocol pp. 693, 702. "He thought it was also clear that merchant vessels engaged in giving military assistance to the enemy ceased in fact to be merchant vessels."

(xx) Protocol, page 704. "So long as the vessel remained a merchant vessel."

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had been discussed and included in the records at the first one, had its full importance for the second one. Science, too, and by no means only German but especially American and French science based its examinations on the close connection of both conferences and it was precisely for that reason that they declared the result achieved in the question of submarines to be ambiguous and dissatisfactory. Here I only want to point to W i l s o n ' s summarizing report on the London Naval Treaty. (x).

It is there in particular where besides the ambiguity of the concept "merchant vessel" the uncertainty connected with the words "active resistance" is pointed out. and it is these very words with which an exception from the protection of the merchantman is connected. an exception which likewise is not contained in the actual text of the London agreement, but, which, nevertheless, is generally recognized. I am referring to merchantmen in an enemy convoy. If the London agreement is interpreted literally, the opinion would have to be upheld that merchantmen in an enemy convoy must also not be attacked witout warning, but that an attacking battle ship would just have to put out of action th escort vessels first and then stop and search the merchantmen afterwards. However, this militarily impossible demand evidently is not made by the prosecution, either. It says in the report of the British Foreign Office which has been mentioned several times:

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(x) American Journal of International Law, 1931, page 307.

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"Ships sailing in enemy convoys are usually deemed to be guilty of forcible resistance and therefore liable to be sunk forthwith."

Here even the Prosecution admits an interpretation of the word "active resistance", an interpretation, which results in no way from the treaty itself but is simply a consequence of military necessity and is thus dictated by common sense.

And this very same common sense demands also that the armed merchant ship be held just as guilty of forcible resistance as the convoyed ship. Let us take an extreme instance in order to make the matter quite clear. An unarmed merchant ship of 20 000 tons and with a speed of 20 knots which is convoyed by a trawler with - let us say - 2 guns and a speed of 15 knots, may be sunk without warning, because it placed itself under the protection of the trawler and thereby made itself guilty of active resistance. If however this same merchant ship does not have the protection of the trawler and instead the 2 guns or even 4 or 6 of them are placed on its decks enabling it to use its full speed, should it not in this case be found just as guilty of offering active resistance as before ? Such deductions really seem to me against all common sense. In the opinion of the prosecution the submari would first have to give the merchantship which is far superior to it in fighting power, the order to stop and wait until the merchantship fires its first broadside at the submarine.

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Only then would it have the right to use its own weapons. Since, however a single artillery hit is nearly always fatal for a submarine although it harms a merchant ship very little as a rule, the result would be the almost certain destruction of the submarine.

"When you see a rattlesnake rearing its head you do not wait until it jumps at you but you destroy it before it gets the chance,"

These are Roosevelt's words in which he justified his order to the U naval forces to attack German submarines. The reason seemed sufficient to him to order the immediate use of arms e v e n w i t h o u t t h e e x i s t e n c e o f a s t a t e o f w a r . It is a solitary instance in war, however, to grant one of two armed opponents the right to fire the first shot and to make it the other's to wait for the first hit. Such an interpretation, however, is contradictory to any military reason. It is no wonder, therefore, if in view of such divergent opinions the experts on International Law even after the London Treaty and the signing of the London Protocol of 1936 consider the treatment of the armed merchant vessels in naval warfare to be an unsolved question. In this instance, too, I should like to point to only o n e scientific source which enjoys especially high authority. It is the draf of an agreement on the rights and duties of neutrals in naval warfare, an agreement which leading American professors of International Law, suc as Jessup, Borchard and Charles Warren published in the "American Journ of International Law" of July 1939, simultaneously giving reasons,

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which furnish an excellent idea of the most recent state of opinion.

Article 54 of this draft corresponds literally to the text of the London Agreement of 1936 with one noticeable exception: the term "Merchant Vessel" is replaced by "unarmed vessel". The next article then continues:

"In their action with regard to enemy a r m e d merchant vessels, belligeren war ships, whether surface or submarine, and belligerent military aircraft are governed by the rules applicable to their action with regard to enemy war-ships".

This opinion is first based on the historical development. At the time when it was customary to arm merchant vessels, i.e. until the end of the last century, there was no question of any protection for the merchant vessel against immediate attack by an enemy warship. With the introduction of armor plating the warship became so superior to the armed merchant vessel that any resistance on the part of the latter was rendered futile and the arming of merchant ships therefore gradually ceased. This defenselessness of the merchant vessel against the warship, and that alone gained for the former the privilege of not being immediate subject to armed attack on the part of the belligerents.

> "As merchantmen lost effective fighting power they acquired a legal immunity from attack without warning."

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This immunity was never conceded to the merchant vessel as such but only to the defenseless and harmless merchant vessel. In respect of which the American expert on International Law H y d e (x) stated in 1922, i.e. after the Washington conference and the afore-mentioned Foch-resolution on U-boat warfare:

"Maritime states have never acquiesced in a principle that a merchant vessel so armed to be capable of destroying a vessel of war of any kind should enjoy immunity from attack at sight, at least when encountering an enemy cruiser of inferior defensive strength."

Legal as well as practical considerations, therefore led the above-mentioned American authorities after the signing of the London Agreement andshortly before the outbreak of the war to form the opinion that armed merchant ships are not protected from attacks without warning.

Here the old discrimination between defensive and offensive armaments is also rejected as inapplicable. It is well known that the American Secretary of State Lansing in his note to the Allies on 18 January 1916 already took the point of view that any kind of armament aboard a merchant vessel will make its fighting strength superior to that of a submarine and that such an armament is therefore of an offensive nature. (xx)

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(x) Hyde, International Law, 1922, Volume II, page 469.

(xx) U.S. Foreign Relations 1916, Supplement page 147.

In the latter course of the world war the USA changed its opinion and declared that mounting guns on the stern could be taker as proof of the defensive character of the armaments. This standpoi was adopted in some international agreements and drafts as well as by British jurists in particular. It does not do justice to the practice of naval warfare.

First of all the guns on many vessels were mounted from the very start in the bows, e.g. as a matter of principle on steam-propelled fishing boats. Furthermore, the anti-aircraft weapons of the merchant vessel which were especially dangerous for the submar were frequently placed on the bridge, and could, therefore be used in all directions. Besides which there can be no discrimination between defensive and offensive armaments on the basis of the way the weapons are placed.

In this respect, orders alone are the decisive factor and the way in which these weapons are meant to be employed. Soon after th war had started the orders of the British Admiralty had already fallen into German hands. A decision of the Tribunal has made it possible for me to submit them. They are contained partly in the "Confidential Fleet Orders" and chiefly in the "Defense of Merchar Shipping Handbook". They were issued in 1938. They, therefore, do not deal with counter measures against illicit German actions but, on the contrary, they were already issued at a time when in Germar warfare in acordance with the London Agreement was the only form of submarine warfare taken into consideration.

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The instructions further show that all British merchant vessels acted from the first day of the war according to orders received from the British Admiralty. These involved the following points in respect of submarine warfare:

1) the report of submarines by radio telegraphy.

2) the use of naval artillery.

3) the use of depth charges.

These instructions were supplemented on October 1st 1939 when a call was transmitted over the radio to ram all submarines.

It might seem unnecessary after this survey to make any mention at all of the defensive and offensive meaning of such orders. The orders on the use of artillery by merchant vessels, however, make a great differentiati i.e. cannons are to be used only for the defense as long as the enemy on his part adheres to the regulations of international law, and for the offensive only when he does not. The orders covering the practical execution of these directives reveal, however, that there is no difference between defensive and offensive use. Admiral Doenitz explained this in detail when he was heard in court and I do not want to repeat it. Actually from the very beginning of the war merchant vessels were under orders to shoot on every occasion at every submarine which came within range of their guns. And that is what the captains of British merchant vessels did. The reason for this offensive action can certainly not be found in transgressions committed by German submarines during the first weeks of the war,

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for even the "Foreign Office" report admits that this conduct was correct. On the other hand the British propaganda may have had great importance which in connection with the mistaken sinking of the "Athenia" on September 3,1939, disseminated through Reuter on the 9th of September the statement of unrestricted submarine warfare and upheld it, notwithstanding the fact that the conduct by the German submarines during the first weeks of the war proved be the contrary of this accusation. Together with the announcement of the British Admiralty's ram-order of October 1, 1939, the Merchant Navy was again informed officially that the German U-boats had stopped to respect the rules of naval warfare and merchant vessels should adjust their conduct accordingly. It seems to me of no inportance that a written supplement to the Admiralty-orders was issued as late as spring of 1940, because nowadays a naval war is not directed by letters but by wireless. But according to the latter, the British captains were directed to use their guns offensively against the German U-boats in accordance with the Admiralty's instructions contained in its handbook, beginning September 9th, or October 1st at the latest. The German order to attack armed enemy merchant vessels without warning was issued on 4 October only. Thu it was justified in any case, even if one wanted to acknowledge difference in treatment for vessels with defensive and offensive armament.

The guns on the merchant vessels and the orders for their use were, however, only a part of a comprehensive system for the military use of merchant vessels. Since the end of September 1939, the fastest vessels, that is those ships that were the least endangered by submarines,

but were especially suited for chasing submarines, received depth charge projectors, that is armaments which make it possible to find the submerged submarines and which thus may be counted as typical weapons for the offensive.

However, what was of more general importance and also of greater danger for the submarines was the order to report every enemy ship on sight giving its type and location. This report was supposed, so said the order, to take advantage of an opportunity which might never recur to destroy the enemy by their own (the British) naval and air force. This is an unequivocal utilization of all merchant vessels for military intelligence service to directly injure the enemy. If one considers the fact that according to the hospital-ship-agreement even the immunity of hospital ships ceases if they relay military information of such a kind, then one need have no doubts about the consequences of such behaviour on the part of a commercial vessel. Whatever craft puts out to sea with the order and intention of using every opportunity that occurs to send military reports about the enemy to its own naval and air forces, is taking part in the hostilities during the entire course of its voyage, and based on the aforementioned report of 1930 of the Committee of Jurists, has no right to be considered as a merchant vessel. Any other conception but this would not do justice to the immediate danger which a wireless report means to the reptrted vessel and which subjects it, often within a few minutes, to attacks by enemy air craft. All of the Admiralty's directives from the very first day of the war show that British merchant vessels were firmly organized with in the system of the British Navy for

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combating the enemy's naval forces. They were part of the military communications network of the British navy and air force, and their arming with cannon and depth charge projectors, all the practical training and orders relative to the service were matters that concerned the British Navy.

We consider it out of the question that a merchant fleet which is thus destined and utilized for battle should count among the vessels entitled to the protection of the London Protocol against sinking without warning. On the grounds of this conception, in connection with the arming of all enemy merchant vessels which was rapidly being completed and order was issued on the 17th of October 1939 to attack all hostile merchant ship without warning.

To sum up, I should like to remark as regards the conduct of German s marines against enemy merchant vessels: I believe that the German conception of the London Protocol of 1936, according to the position generall taken by the experts of the powers involved as well as according to the we known opinion of numerous and competent scientists of all countries, had a trace of dishonesty in it. If I were to express myself with caution, I woul say that it is, legally at least, perfectly tenable, and thus not the slightest charge can be raised against the German Naval Command, if it issued its orders on a sensible and perfectly fair Basis. We have shown that these orders were given only after such conditions had been created by the exposure of British measures as justified the orders issued according to the concepts of German law.

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Before I leave this subject I should like to recall to the Tribunal the special protection which the German orders provided for passenger vessels. These were excluded for a long time from all sinking measures, even when they sailed in an enemy convoy and, therefore, could have been sunk immediately, according to the British conception, too. These measures point out especially clearly that accusation of disregard and brutality is unjustified. The passenger vessels were only included in the orders concerning other vessels when in the spring of 1940 there was no more harmless passenger traffic at all, and these ships, because of their great speed and heavy armaments proved to be particularly dangerous enemies for submarines. If, therefore, Mr. Roger Allen's report cites as an especially good example of German submarine cruelty the sinking in the autumn of 1940 of the "City of Benares" then this example is not very happily selected, because the "City of Benares" was armed and went under convoy.

I shall turn now to the treatment of neutrals in the conduct of German submarine warfare, and can at once point again in this connection to the example which Mr. Roger Allen holds up especially for the sinking of a neutral against international law. It is a question of the torpedoing of the Danish steamer "Vendia" which occurred at the end of September 1939. The Tribunal will recall that this ship was stopped in a regular way and was torpedoed and sunk only when it began preparations for ramming the German submarine. This occurrence led the German government to protest to the Danish government on account of the hostile conduct shown by a neutral boat.

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The analysis of this one example may show only how different things look if not only the result, namely the sinking of a neutral ship, is known but also the causes which led to this result. Until the last day of the war the fundamental order to the German submarines was in effect not to attack merchantmen recognized as neutral. Therewere some accurately defined exceptions to this order of which the neutral powers had been notified. They affected in the first place ships which conducted themselves in a suspicious or hostile manner, and secondly ships in announced operational.areas.

To the first group belonged above all those vessels which sailed in the war area with dimmed lights. On 26 September 1939 the commander of the submarine fleet asked the high command of the navy for permission to attack without warning vessels proceeding in the channel with dimmed lights. The reason was clear. It is there where at night the enemy's troop and materiel shipments took place through which the second wave of the British expeditionary army was ferried across the Channel to France. At that time the order still was in effect that French ships be not attacked at all. But since at night French ships could not be distinguished from English vessels, submarine warfare in the Channel had would have had to be halted completely in compliance with this order. The Tribunal heard from a witness that in this way a 20 000 t troop transport passed by the torpedo tubes of a German submarine unmolested. Such a result in a war is grotesque and it goes without saying that, therefore, the naval command (Seekriegsleitung) approved the request of the commander of the submarine fleet.

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The prosecution has now made much ado about a note written on this occasion by an assistant at the Naval Command, Lieutenant Commander Fresd Already the Chief of Section, Admiral Wagner, did not approve of the opinions expressed in it, and, therefore, they did not lead to corresponding orders. The order to attack blacked-out ships, was issued by radio without any further exp nation on the part of the Naval Command, and on 4 October it was extended by to further regions surrounding the English coast, and again without any explanation in the senseof the above-mentioned note.

Examining the question of blacked-out vessels from the legal standpoint, VANSE (x), the well-known expert on the law of naval warfare, makes the following remark:

> "In war, a blacked-out vessel must in case of doubt be considered as an enemy warship. A neutral, as well as an enemy merchant vessel navigating without lights, voluntarily renounces during the hours of darkness / all its right to immunity from attack without being stopped."

I furthermore refer to Churchill's declaration made in the House of Commons on 8 May 1940, concerning the action of British submarines in the Skagerrak. Since the beginning of April, the latter had the order to attack all German vessels without warning during the daytime, and all v e s s e l s and so al neutrals, too, at night. This implies recognition of the legal standpoint expos It even goes beyond the German order, insofar as neutral merchant vessels navigating with all lights on were sunk without warning in these waters during the night.

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(x) Vanselow, International Law, Berlin 1931, No. 226i.

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In view of the clear legal aspect it would hardly have been necessary to give an express warning to neutral shipping against suspicious or hostile conduct. Nevertheless, the naval command (Seekriegsleitung) saw to it that this was done.

On 28 September 1939 the first German note was sent to the neutral governments with the request that they warn their merchant ships against any suspicious conduct such as changes in course and the use of wireless upon sighting German naval forces, dimming, or non-compliance with the request to stop etc. These warnings were subsequently repeated several times and the neutral governments passed them on to their captains. All this has been proved by the documents which have been submitted. Therefore, if, as a result of suspicious or hostile conduct, neutral ships were treated like enemy ships, they have only themselves to blame for it. The German submarines were not allowed to attack any one who as a neutral maintained a correct attitude during the war and there are hundreds of examples to prove that such attacks never did occur.

Now I wish to deal with the second danger which threatened neutral shipping: The zones of operations. The actual development was, briefly summed up, as follows:

On 24 November 1939 the Reich Government sent a note to all seafarin neutrals in which it points to the use of enemy merchant ships for attacking purposes as well as to the fact that the Government of the United States had barred to its own shipping a carefully defined naval zone around the Central European coast, the so-called USA - combat zone.

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As the note states, these two facts give the Reich Government cause

> "to warn anew and more strongly that in view of the fact that the actions are carried on w i t h a l l m e a n s of modern war technics and in view of the fact that these actions are increasing in the waters around the British Isles and near the French coast these waters can no longer be consid safe for neutral shipping."

The note thereupon recommends for the shipping between neutral powers certain sea routes which are not endangered by German means of naval warfare and, furthermore, it recommends legislative measures according to the example set by the USA. In concluding the Reich Government rejects the responsibility for consequences which would follow if warning and recommendation should not be complied with. This note constituted the announcement of an operational area of the US combat zone with the limitation that only in those sea zones which are actually endangered by actions against the enemy, consideration could no longer be given to neutral shipping.

The Naval High Command (Seekriegsleitung) indeed observed this limitation. In the beginning the neutral powers had more than six months in which to take the measures recommended by the German Government for the safety of their own shipping and to direct their shipping along the routes announced. Starting January the German Command then opened up to the German naval forces, within the operational area announced,

accurately defined zones around the English coast in which an attack without warning against all ships sailing there was admissible. The naval chart on which these zones had been marked was submitted to the Tribunal. The chart shows that gradually those zones and only those were taken in which, as a result of mutually increasing attacks and defensive actions at sea and in the air, engagements continually occured so that every ship entering this area was operating with the naval forces of both powers nearby. The last one of these zones was designated late in May 1940. These zones were not and needed not be announced because they were all within the area of operati as proclaimed on 24 November 1939. The distance of these zones from the enemy coast was on the average 60 sea miles. Outside these boundaries the declaration concerning the area of operations of 24 November was not observed, i.e. neutral ships could be stopped and sunk only in accordance with the Prize Ordinance.

This situation changed when after the collapse of France in the summer of 1940 the British Isles became the center of the war. On 17 August 1940 t Reich Government sent to the neutral governments a declaration in which the entire area of the US combat zone around England without any limitation was designated as operational area.

"E v e r y  s h i p", so the note reads,
"which sails in this area exposes itself to destruction not only by mines, but

also by other combat means. Therefore, the German Government warns once more and urgently against entering the endangered area."

From this time on the area was fully utilized and the immediate use of arms against the craft encountered in it was permitted to all naval and air forces insofar as special exceptions had not been ordered. The entire development described was openly dealt with in the German press and Grand Admiral Raeder granted interviews to the foreign press on this subject which clearly showed the German viewpoint. If, therefore, in the mentioned sea zones neutral ships and crews sustained losses, at least they cannot complain about not having been warned explicitly and urgently beforehand.

This statement alone has not much meaning in the question of whether areas of operation as such constitute an admissible measu Here, too, the prosecution will take the position that in the London Protocol of 1936 no exceptions of any kind were made for areas of operation and, therefore, such exceptions naturally do not exist.

As well known, operational areas were first proclaimed in the first world war. The first declaration of this kind came from the British Government on 2 November 1914 and designated the entire area of the North Sea as a military area. This declaration was justified on the basis that it was a reprisal against alleged

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German violations of international law. Since this justification naturally was not recognized, the imperial government replied on 4 February 1915 by designating the waters around England as military area. On both sides certain extensions were made subsequently. I do not want to go into the individual formulations of these declarations and into the sagacious legal deductions which were made from their wording for or against the admissibility of these declarations. Whether these areas are designated as military area, barred zone, operational area or danger zone, the point alwa was that the naval forces in the announced area had permission to destroy any ship encountered there. After the world war the conviction of naval officers and experts in international law alik was in general that the operational area would be maintained as a means of naval warfare. The development typical for the rules of naval warfare was confirmed here, namely that the modern technique of war forcibly leads to the use of war methods which at first are introduced on the grounds of being reprisals, but which are gradua being used also without such a justification and recognized as legitimate.

The technical reasons for such a development are very obvious The improvement of mines made it possible to endanger large sea areas by mines. But if it was admissible to destroy by mines every ship sailing despite warning in a designated sea area, one could see no reason why other means of naval warfare should not be used.

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in this area in the same way. Besides, the traditional institution of the block de directly outside enemy ports and coasts by mines, submarines and aircraft was practically made impossible so that the sea powers had to look for new ways to bar the approach to enemy coasts effectively. Consequently, it was these necessities which were the compelling factors in bringing about the recognition of the operational areas.

It is true that there was by no means a uniform interpretation concerning the particular pre-requisites under which the declaration of such areas would be considered admissible just as there was none with regard to the designation which the belligerent power must choose. Also the conferences of 1922 and 1930 did not change anything in that respect. This is shown by the efforts which were also after 1930 exerted especially by American politicians and experts in international law for a solution of this question.(x)

Unfortunately, there is no time here to discuss these questions in detail and, therefore, it must suffice for the purposes of the defense to state that during the conferences in Washington in 1922 and in London in 1930 the operational area was an institution known to all powers concerned, an institution operating in a way which had been determined by both sides in the first world war

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(x) In 1935 the American Senator Ney proposed to prohibit operational areas. In 1937 Charles Warren made a motion for a discussion on it in the Society for International Law. And the draft for a convention which was already mentioned before and which was drawn up by American scientists, also dealt with this subject.

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to the effect that all ships encountered in it would be subject to immediate destruction.

If this institution were to have been abolished in the mentioned conferences, especially in the treaty of 1930, an accord should have been reached on this question if not in the text of the agreement at least in the negotiations, The transcripts show nothing of the kind. The relationship between operational area and London Protocol remained unsettled.

The French Admiral Castex has the same viewpoint (x). Admiral Bauer, Commander of Submarines in the first world war, in 1931 stated his disapproval of the application of the London rules in the operational area and this opinion was absolutely known to the British Navy (xx). In a thorough study of Ernst Schmitz (xxx) of 1938 a merchant vessel which enters an operational area despite the general prohibition is regarded as being guilty of "persistent refusal to stop". The powers participating in the conferences in Washington and London consciously avoided, in these as in other cases, to start controversial questions on which no accord could be reached. Therefore, every power maintained a free hand to champion in practice that opinion which corresponded to its interests.

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(x) Theories on Strategy. IV, p. 323: "Even in a military zone, would one not be confronted with the damned article 22 of the London Treaty?"

(xx) Bauer, The Submarine, 1931. A Report by Capt. G.P.Thomson, R.N., in 76 Journal of the Royal News Instruction, 1931, page 511.

(xxx) Barred Zones in Naval War, Journal for Foreign Public Law and International Law, Vol. VIII, 1938, p. 671.

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There was no doubt left in the minds of the participants on this point and I have as a witness for this none less important than the French Minister for Foreign Affairs of that time, Briand. In his instruction of 30 December 1921 to Sarraut, the French chief delegate in Washington, he announces the basic readiness of concluding an agreement about submarine warfare. However, he then points out a series of question as being essential parts of such an agreement, among them the arming of merchant ships and the definition of combat zones. The instruction goes on:

"It is indispensable to examine these questions and to solve them by a joint agreement, for surface vessels as well as for submarines and aircraft, in order not to establish ineffective and deceptive stipulations. (x)."

Particularly with respect to the question concerning the area of operation Briand characterizes the submarine rules as being "ineffective and deceptive." After this testimony nobody will be able to designate the German conception as fraudulent according to which ships in declared areas of operation are not under the protection of the London Protocol. Even Mr. Roger Allen's report concedes this. (xx)

(x) French Yellow Book "The Washington Conference." Page 88.

(xx) Report of 8 October 1940, Page 3: One thing is certain namely apart from vessels in declared war zones destruction of a merchant vessel is envisaged if even only after capture.

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Therefore the attacks of the prosecution seem to be directed, as I understand from the cross examinations, less against the existance of such zones than against their extent and we have repeatedly heard the figure of 750.000 square miles. Incidentally, it is to be noticed that this figure includes the land area of Great Britain, Ireland and Western France, the area of water alone amounts only to 600.000 square miles. I quite agree however that through operational areas of such a size the interests of the Neutrals are badly prejudiced. The more remarkable is the fact that the above mentioned American draft for an agreement of 1939 which concerns the rights and duties of Neutrals provides for a considerable expansion of the operational area. Such an area which is termed "Blockade Zone" in the draft is to include the waters up to a distance of 50 sea miles from the blockaded coast. This would correspond to a large extent to the area of waters in which surprise attacks were authorized until 17 August 1940; it covers 200.000 square miles approximately. However it seems to me almost impossible to approach from a scientific angle such an eminently practical question as that of the expansion of an operational area. As long as this question is not settled by an agreement, the actual determination will always be a compromise between what is desirable from a military point of view and what is politically possible. It seems to me that laws are only violated when a belligerant misuses his power against neutrals. The question as to whether such a misuse exists should be made dependent upon the attitude of the opponent towards the neutrals as well as upon the measures

taken by the Neutrals themselves.

During the production of documents, the Tribunal has eliminated al those which I intended to utilize in order to prove that British naval warfare also paid no attention to the interests of neutrals when they were in contradiction with their own interests. If it is the Tribunal's wish, I will not go into the details of the British measures and in summing up I will mention them only in so far as they are indispensable for the legal argumentation. The following points are chiefly concerned:

1) The British regulations of 3 September 1939 concerning contraba goods which practically prevented neutral mercantile traffic with Germany through the introduction of the so-called "hunger-blockade".

2) The decree concerning control ports for contraband goods compelled neutral ships to make great detours through the middl of the war zone , to which must be imputed without doubt a series of losses of neutral ships and crews.

3) The introduction of an export-blockade against Germany on 27 November 1939 by means of which the importation of German good was made impossible for neutrals.

4) The introduction of the Navicert-System in connection with the black lists which put the whole of neutral trade under British control and which made ships which did not accept this system liable to be seized and confiscated.

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I am not considering the question here whether these British measures towards neutrals were admissible or not from the point of view of international law. In any case the neutrals themselves considered many of them inadmissible and there was hardly any which did not arouse more or less vehement protests, as for instance on the part of Spain, the Netherlands, Soviet Russia and the USA. From the beginning the British Government on its side had prevented any legal examination of its measures by freeing itself from the optional clauses of the Permanent International Tribunal at the Hague, through a note of 7 September 1939. This step was expressly based on the necessity of providing the British Navy with full freedom of action.

On the British side the fact was emphasized in the first world war already and has been emphasized ever since that British measures did indeed prejudice the interests and possibly the rights, too, of the neutrals. However, they did not imperil either the ships or the crews and are therefore considered morally superior to the inhuman German measures. First, as mentioned before the obligation of entering control ports was dangerous for neutral ships and crews and for this very reason neutral countries protested against it. But apart from this it seems to me that the actual difference between the British and German measures for blockading the adversary are not founded upon moral differences but upon differences in their sea power. In the waters where the British navy did not exercise naval supremacy, namely around the coasts we were occupying as well as in the Baltic Sea, it used the same methods of naval warfare as we did.

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In any case, the official German opinion was that the British mentioned control measures against neutrals were inadmissible, and the Reich Government formulated against the neutral powers the accusation that they protested indeed but actually submitted to th British measures. This is clearly stated in the proclamation issue on the occasion of the proclamation of the blockade on 17 August 1940. Consequently, the following facts confronted the German Naval Command:

1) A legal trade between the Neutrals and the British Isles no lon existed. On the ground of the German answers to the British stipulations concerning contraband goods and the British export blockade, any trade to and from England was contraband trade, ther fore illegal from the point of view of international law.

2) The Neutrals submitted in practice to all British measures even when these measures were in contradiction with their own interests and their own conception of legality.

3) Thus, the Neutrals directly supported British warfare. For, by submitting to the British control system in their own country they saved the British navy the use of large fighting forces which, according to the hitherto existing international law should have exercised the trade control at sea and which were now available fo other war tasks. Therefore, the German Command, in determining its operational area in order to prevent the illegal traffic from reaching England, saw no reason for giving preference to the considerations

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towards the neutrals, to the detriment of its own military requirements. This all the less as the neutral shipping which despite all warnings continued to travel to England took big money for this increased risk and still considered therefore the trade with England as a lucrative business. x)

In addition to that, the most important neutrals took themselves measures whic can be regarded as a completely new interpretation of the existing laws of naval warfare. All American countries jointly proclaimed the Pan-American safety zone, an area along the American coast up to a distance of approximately 300 sea miles. In these waters comprising altogether several million square miles, they ask the belligerents to give up the exercise of those rights which according to the hitherto existing International Law naval forces of the belligerents were authorized to apply to neutrals. On the other hand, as I hav already mentioned, the President of the United States prohibited on 4 November 1939 U.S. citizens and ships to travel within an area of waters expanding over approximately 1 million square miles along the European coast. Thus the development of the laws of naval warfare, under leading participation of the neutrals, forcibly led to a recognition of large areas reserved either for the purpose of safety or for that of combat.

x) Cmdr. Russel Grenfell, RN, The Art of the Admiral, London 1937, Page 80. "The neutral merchants, however, are not likely to relinquish a highly lucrative trade without a struggle and thus there arises the acrimonious wrangle between belligerents and neutrals which is a regular feature of maritime warfare, the rules for which are dignified by the name of International Law.

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At the same time the American President explicitly stated in his proclamation that the maritime zone he had had closed was endangered by combat action as a result of technical developments. The proclamation thereby only took into consideration the development of modern weapons, the long-range coastal artillery which for example could easily fire across the English Channel, the invention of locating devices which permitted land-supervision of maritime traffic over dozens of sea-miles, and particularly the increased speed and range of aircraft.

From this development, the German Naval Command drew the same conclusions as the above mentioned neutrals namely that defense and offense would necessarily have to cover large maritime areas in this war. It was therefore not from choice that the German operational area/which the prosecution objects, to, grew to such a size, it was only because it was adopting itself to a system w which was also recognized by the other powers as legitimate.

In order to examine the legality of the German measures on the basis of enemy methods may I ask the Tribunal to recall the naval chart on which the British zones of warning and danger are marked. These zones cover about 120.000 square miles. Even if these dimensions are smaller than those of the German operational area, it seems to me that the difference between 100 100.000 and 600.000 square miles is not so much a question of legal judgment as one of coastal length and of strategic position on the sea. This observation is confirmed by the American practice

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against Japan such as Admiral Nimitz has professed.

He says:

"In the interest of the conduct of operations against Japan the area of the Pacific Ocean is declared a zone of operations."

This zone of operations covers over 30 million square miles. All ships in it with the exception of men own and Allied as well as hospital ships were sunk without warning. The order was issued on the first day of the war, on 7 December 1941, when the Chief of the Naval High Command ordered unrestricted submarine warfare against Japan.

It is not my business to examine whether this order issued on the first day of the war is to be looked upon and justified as a measure of reprisal. For me the important thing is to show how it worked out in practice, and this is unequivocal.

The Prosecution attaches special blame to the orders to carry out surprise attacks in the operational areas if possible unnoticed, so that mine hits may be pretended. Orders to this effect existed for the period from January until August 1940, i.e. during the period when submarines were permitted to act without warning not in the whole operational area of 24 November 1939 but only in the especially defined areas below the English coast. In this camouflage the Prosecution sees proof of a bad conscience and thereby the consciousness of wrong doing. The real reasons for the measures ordered were of a twofold nature: military and political. For the admirals concerned the military reasons stood of course in the foreground,

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and the commander of the submarine fleet also knew only these reasons. The enemy was to be left in uncertainty as to of [illegible] what weapons of naval warfare had caused his losses and his defen was to be led astray in this manner. It is self-evident that such misleading of the enemy is fully justified in time of war. The measures had the desired military success and in numerous cases the British Navy employed flotillas of mine sweepers, where a ship had been torpedoed, and conversely started a submarine chase where a loss had occurred through mine hits.

For the Supreme Command, however, it was not the military but the political reasons which were the determining factor. Thes invisible attacks were meant to give an opportunity of denying before neutrals that the sinkings were due to submarines, and of training them back to mines. This actually happened in some cases. Does that now mean that the German Government itself considered illegal the use of surprise submarine action within the operatio area? I do not think so.

In view of the repeated accusations which the Prosecution has built up here and elsewhere from the camouflaging of measures the denial of facts, I feel obliged to make a few remarks on the point as to whether there is any obligation at all in internation politics to tell the truth. However, it may be in peacetime, in time of war at any rate on cannot recognize any obligation to tel the truth in a question which may be of advantage to the enemy. I only need to point to

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Hugo Grotius who says:

"One may conceal the truth wisely.

Dissimulation is absolutely necessary and unavoidable." (x)

What would it have meant for the military situation if U-boat sinkings in the instances dealt with here, had not been denied but admitted instead? First of all, since that would have come to the knowledge of the enemy, too, we should have lost the military advantage which lay in the misleading of his defense. Furthermore - and this is no less important - we might quite possibly have furnished our enemy with allies who would have helped him with propaganda if not with theirweapons. In view of the fact that some of the neutrals concerned were so dependent on England, they would probably not have recognized the German viewpoint as to the legitimacy of the operational areas, especially since this viewpoint was contrary to their own interests. It would have led to political tensions and, possibly, to armed conflicts. Our enemies would have derived the only immediate advantage from it. From the standpoint of the law this endeavor to camouflage the use of submarines even from the neutrals, does not seem objectionable to me.

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(x) De jure pacis ac belli, book III, chapter I, para.6

quot. Augustin. "One may conceal the truth wisely" and Cicero "Dissimulation is absolutely necessary and unavoidable, especially for those to whom the care of the state is entrusted."

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But if the prosecution uses this with the intention of moral defamation, it applies standards here which heretofore have never been applied to the conduct of a war and to the politics of any other country in the world. It was just in naval warfare in which the same methods of camouflage were employed by the other side, too. The operational areas which Great Britain declared around the European coasts from Norway to Biscay were, with the exception of the Biscay area, declared mine danger zones. But we know from Churchill's statement of May 1940 as well as from testimonies of witnesses that in these areas there were unlimited attack with submarines, speedboats and above all with aeroplanes. Consequently, very of neither the German command nor the neutral country which had been attacked knew whether a loss sustained in such an area really should be traced back to a mine or to another weapon of naval warfare. To conclude that the camouflaging of a measure constitutes its illegality thus seems to me entirely without basis.

Within the German operational zone all ships were on principle attacked without warning. However, orders had been given to make exceptions in the case of certain neutrals, such as, in the beginning, Japan, the Soviet Union, Spain, and Italy. In this measure the prosecution saw the endeavor of the Naval Command (Seekriegleitung) to terrorize the smaller neutral countries whereas it dared not pick a quarrle with the big ones. The real reason for this different treatment is given in Document UK 65 in the notation on the report which the Commander-in-Chief of the Navy made to the Fuehrer on 16 October 1939. According to this notation

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the neutral governments mentioned are requested to declare that they will not carry contraband of war, in every other respect they will be treated just like any other neutral countries. This means that the reason for the different treatment was merely that certain countries were willing and in a position to forbid their boats to carry contraband of war to England, whereas others could not or would not do it became of their political attitude or their economic dependence on England. Therefore, it is not a question of terrorizing the smaller neutrals and sparing the bigger ones, but of preventing traffic in contraband of war and sparing of legal commercial trade. Since no general legal maxim exists which compels the belligerent power to treat all neutral powers alike, no objection can be raised on the basis of international law. It would indeed be strange if here, in the name of humanity, the demand were made that German submarines should have sunk even those ships which they did not want to sink at all.

The Tribunal saw from the Standing War Orders submitted that during the further course of the war even the s m a l l powers which were the only neutral ones left, could, by virtue of shipping agreements, cross the operational area along certain routes without being molested by German submarines. In this way, for instance, Sweden and Switzerland as well as Turkey could carry on their maritime trade during the war.

Outside the operational area announced the German submarines were never permitted to attack neutral ships. In this respect the naval command

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desisted from waging any submarine warfare against neutral merchant shipping, since enemy air surveillance made stopping and searching was too dangerous for German submarines. Against the disadvantage of submarine warfare within the operational area, the neutrals had, outside the area, the advantage of remaining completely unmolested, even if they were shipping contraband goods and were liable to be sunk because of this without being stopped. Thus, the neutral vessel outside the operational area was only in danger if it behaved in a suspicious or hostile way or if it was not clearly marked as neutral. And the German Naval Command (Seekriegsleitung) again and again called the attention of the neutral powers to this necessity. In this connection I must mention the order of 18 July 1941, according to which U.S.A. vessels within the operational area were assimilated to all other neutrals, i.e. they could be attacked without warning. The prosecution has seen in this an especial proof that the submarine warfare against neutrals was waged in a "cynical and opportunist" way. If this is to mean, that it was also influenced by political considerations, then I am ready to admit it. But I do not consider it a reproach; for since war itself is a political weapon, it is in keeping with its essence, if individual sectors of it are placed under the leadership of politics. In particular, no reproach should be seen in the orders of the German leadership as regards the utilization of submarines against the US, because it is just they which are a proof of

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the efforts to avoid any conflict with the United States.

As is known to the Tribunal from documents and the testimonies of witnesses the ships of the United States during the first years of the war were exempt from all measures of naval warfare, and this was true as well when, contrary to the original American legislation, they sailed into the USA combat zone and thus into the German operational area in order to carry war material to England. This policy was changed only when in addition to the many unneutral acts of the past the active employment of the American Navy had been ordered for the protection of British supply lines. Well known are the statements of President Roosevelt which he made at that time about the "bridge of boats over the Atlantic" and the support which shc be given to England "by every means short of war." It may be doubtful whether the "realistic attitude" (x) which the USA naval and air forces were ordered to take, at that time, did not already constitute an illegal war as was claimed just now by some American sources (xx).

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(x) Admiral King:" Report of the American Chief of Naval Operations", German Edition, 1946, page 157: "However the situation might have been viewed on the basis of international law, the American Navy took a realistic position toward the events in the Atlantic."

(xx) John Chamberlain, The Man who Pushed Pearl Harbor, "Life" of 1 April 1946.

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At least the USA had abandoned its neutrality and claimed the position of a "Non belligerent" which was also a new aspect of International Law in this war. If in this connection one wished to raise the charge of cynicism, it should be directed against the orders which were issued in justification of the consequences of the American attitude.

I have endeavored to present the Tribunal with a survey of the essential orders issued, and to say a few things in respect of their legality. No doubt, there were instances of attacks on ships which according to the orders mentioned should not have been attacked. There are only few such cases, and some of them have been brought up at this trial. The best known concerns the sinking of the British passenger vessel "Athenia" on September 3, 1939 by the "U 30" under the command of Lieutenant Captain Lemp. The sinking of this ship was due to the fact that the commander took it by mistake for an auxiliary vessel. If the Tribunal still hesitated to believe the concurring statements of all the witnesses heard here in this critical and so much talked of case, these doubts would be removed by the behavior of the same commandant in the days and weeks following the sinking. Lt. Captain Lemp, as the log of "U 30" of that time shows, adhered strictly to the prize ordinance,

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and from this log I was able to submit several examples of the fair and gentlemanly conduct of German commandants even when by such conduct they greatly endangered their submarines.

Only on the return of the U 30 from its operations at the end of September 1939 were the Commander of submarines and the Commander-in-Chief of the navy fully informed of the whole affair of the sinking of the "Athenia." Upon his return the commandant reported to the U boat commander the mistake which he himself recognized as such and was sent to Berlin to report in person .

Dr. Siemers will deal with the political development of this matter.

I only mention the military occurrences: Admiral Doenitz received the following communication from the Naval High Command:

1. That the affair be further dealt with politically in Berlin.
2. That Court-martial proceedings are not necessary since the commandant acted in good faith.
3. That the entire matter be kept in strict secrecy.

On the grounds of this order the U-boat commander gave orders for the report on the sinking of the Athenia to be removed from the log of the "U 30" and gave instructions that the log be completed in such a manner as to make the absence of an entry inconspicuous.

As the Tribunal has seen, this order was not carried out satisfactorily, obviously for the reason that the officer in charge had no experience whatever of such measures.

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The Prosecution pointed out this changing of the war diary as a particularly criminal act of falsification. This, it seems to me, is based on a misunderstanding of the facts. The war diary is nothing else but a military report by the commandant to his superior commands. What occurrences should or should not be included in reports of this kind is not decided by any legal or moral principle but is solely a matter of military regulations. The war diary was meant to be secret, however, it was - like many secret matters - accessible to a very large group of people. This is already apparent from the fact that it had been issued in 8 copies, of which some were intended not only for the higher staffs, but fo schools and for training flotillas as well. Therefore, whenever an occurrence was to be restricted to the knowledge of a small group of individuals, it was n to be reported [illegible] in the war diary. Since the war diary was kept consecutiv the missing period necessarily had to be filled in with another, ergo incorrect entry. I can see nothing immoral in such a measure, much less anything illegal. As long as there is secrecy in time of war, - and this is the case in all countries,-it means that all facts cannot be told to everybody, and therefore one s times has to make incorrect statements,too. A certain moral offense could perha be seen in such action if thereby a falsification of history for all times had been intended. This, however, was by no means the case. The Commandant's report in regard to the sinking of the "Athenia"

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was of course submitted in the original form to the immediate superiors, the Commander of the U-boats and the Commander-in-Chief of the Navy, and was also kept there.

I should like further to say briefly, that a g e n e r a l order, not to enter certain happenings into the war diary, has never existed.

The "Athenia" case shows one more thing: the manner in which the compliance of U-boat commandants with issued orders was enforced. In spite of the justified conception of the Naval High Command that the commandant acted in good faith, he was punished with arrest by Admiral Doenitz because by employing greater caution he perhaps might have recognized that this was not an auxiliary cruiser. Punishment was meted out in other cases, too, where the orders had been mistakenly violated.

The Tribunal knows the wireless communications of September 1942, by which on the occasion of the sinking of "Monte Gorbea" the commandant had been informed that upon his return he will have to face court martial proceedings for violation of orders regarding the conduct toward neutrals. All commandants received notice of this measure.

The Tribunal will please consider what such strict threats mean to a commandant at sea. If the directives of the American Manual for Courts-Martial were to be considered as a basis, then court martial proceedings against officers should only be initiated in cases where dismissal from the service seems warranted. *)

*) Manual for Courts-Martial, U.S. Army 1928, p.10.

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That should never be the case when the violation of an order is an accidental one. For a commander who is supposed to make war and gain successes with his soldiers it is extremely hard and in fact under certain circumstances actually a mistake to have one of his commandants on his return from a successful operation tried before a court martial because of a failure which occurred in that action.

Every military leadership acts in accordance with these principles. In this connection I will refer to the unlimited commendation which the commander of the British destroyer "Cossak" received for setting free the prisoners of the "Altmark" in spite of the incidents which occurred during this action and which were probably regretted by the British, too.

I had to go into these matters in order to meet the accusation that any sinkings carried out against orders were sanctioned afterwards by the High Command in so far as no drastic steps were taken against the commandant. Especially in the field of submarine warfare compliance with orders issued was ensured by the continuous personal contact of the commandants with their commander. After the conclusion of every enemy operation an oral report had to be made , and all measures taken were subjected to sharp criticism, simultaneously whilst preventive instructions were given at the same time for future behavior.

The German submarines undertook many thousands of combat operations during this war. In the course of them orders issued were violated only in very rare instances. If one considers how difficult it is for a submarine to establish its exact position and the boundaries

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of an operational area and to distinguish an armed from an unarmed merchant vessel , a passenger ship from a troop transport, or a neutral from an enemy ship the low number of sinkings which were considered illegal by the Germans too, must be taken as proof of an especially effective and conscientious leadership. After this discussion of the factual development of German submarine warfare I still have to deal with the accusations built up by the prosecution from some preparatory deliberations on the subject of the organization of submarine warfare.

Simultaneously with the combat instructions of 3 September 1939 in which German submarines were ordered to comply in their operations strictly with the Prize Ordinance, an order was prepared in the Naval High Command decreeing action without warning in case the enemy merchantmen were armed. In addition to this during the first days of the war, there was an exchange of correspondence with the Foreign Office on the subject of declaring prohibited zones.

The Prosecution looks upon these two documents as proof of the will to conduct a war against International Law from the very start. I on the other hand regard these same documents as proof of the fact that the Naval Command was fully unprepared for a war with England and that it was only when the British had already declared war that it began to set about thinking in the most primitive way how such a war should be conducted. Since neither surprise attacks on armed merchant vessels nor the declaration of prohibited zones

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violate International Law, a belligerent should be allowed just to think over on the outbreak of war if and when he wants to make use of these opportunities. As we know from the above-mentioned orders of the British Admiralty as early as 1938 the latter had made a thorough study of all the possibilities resulting from the war upon commercial shipping and had been worked them out in a practical way.

This same standpoint holds good also for the memorandum of the Naval High Command of 15 October 1939, which has been quoted several times by the Prosecution. Its very heading shows that it is a study.

"Possibilities for the intensification of naval warfare."

In accordance with the heading the memorandum reveals an examination of military demands for effective naval warfare against England and the legal possibilities for fulfilling these demands. The result was the order of 17 October 1939 decreeing the immediate use of arms against all enemy merchant vessels, justification for which resulted, as we have already shown, from their having been armed and incorporated in the military system. Beyond this no intensifying measures were regarded as justified for the time being and the suggestion made was to wait and see what the further conduct of the enemy would be like. . . . .

One sentence in this memorandum arouses special distrust on the part of the Prosecution. It says that naval warfare must be kept as a matter of principle within the frame-work of existing International Law. But be measures which might result in successes decisive for the war would have to taken, however, even if <u>new</u> laws of naval warfare were created thereby. Does this really constitute a renunciation of International Law?

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on the contrary. A departure from existing International Law is made dependent only on two quite limited conditions:

1. A military one, namely,that if measures are involved, which were of decisive importance for the outcome of the war, i.e. that would at the same time shorten the war, (x)

2. a moral one, namely if the nature of the new measures makes them suitable for incorporation in a new International Law.

The memorandum itself states that this would be possible only within the framework of the laws of military combat ethics, and a demand is therefore made for rigid adherence without any exceptions to these ethics of warfare. Under these conditions there can hardly be any doubt as to the possibility of formulating new international laws.

As expressed by the well-known expert on International Law, Frhr. von Freytagh-Loringhoven.

> "It has always been war which has given its strongest/impulses to International Law. Sometimes they have been of positive and sometimes of a negative nature, they have led to further development of already existing institutions and norms, to the creation of new forms or the reversion to old ones, and not infrequently also to failures." (xx)

Especially in this trial which itself is supposed to serve the development of new International Law, the possibility of such a development cannot be denied.

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(x) With regard to this point I refer to the extensive literature on the subject of the right of self-preservation in case of urgent necessity. This right was given as a reason for the attack on the Danish Fleet in 1807 as well as for the Hunger Blockade against Germany.

(xx) Frhr. v. Freytagh-Loringhoven, "Formulation of New International Laws in time of War" Hamburg 1941, Page 5.

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The American prosecutor Justice Robert Jackson in his report to the President of the United States with regard to this problem expressed his opinion as follows:

> "International Law is not capable of development by legislation, for there is no continuously sitting international legislature. Innovations and revisions in International Law are brought about by the action of governments, designed to meet a change in circumstances. It grows, as did the Common -law, through decisions reached from time to time in adapting settled principles to new situations." (x)

These words carry a full justification of the clause objected to by the prosecution in the memorandum of the Naval High Command. And that the Allies too deemed war deciding measures justified, even though they were contradictory to the present views of international law, is proven by the use of the atom-bomb against Japanese cities.

As I am interested in justifying the actual measures taken by the Naval High Command, I did not consider, who of the two admirals accused carries more or less responsibility for one or for the other measure. As a formal basis in nearl all cases a Führer-decree exists. Both admirals, however, stated that they consider themselves fully responsible for all orders of the naval war that

(x) excerpt from "Neue Auslese" 1936, booklet 1, p.16

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they gave or which they transmitted. I should like to add to th only two remarks:

As far as political considerations were decisive for orders of the U-boat war, the commander-in-chief of the Navy had no influence on them. The commander of the U-boats was not even notified of these considerations, just as little as of the political settlement of incidents which arose through U-boats.

My second remark concerns the question, to what extent a military commander may be held responsible for the accuracy of legal considerations which he does not make himself, but wh are delivered to him by the first experts of his country who are not just small-town lawyers. For the commander of U-boats it is to be added, that he had only tactical tasks and that his staff contained only a few officers, none of whom had the ability, to examine questions of international law of the importance mentioned here. He therefore had to rely that the orders issued by the Naval War Command were examined as to their legality and were in order. That is probably being handled in a like manner in every navy of the world. A professional seaman is not competent for legal questions; with this reasoning the tribunal cut off a remark by Admiral Dönitz about a legal question. This condition must, however, be considered in applying principles which the German Supreme Court during the war crimes trials after the first world-war formulated in this way:

"The culprit must be conscious of the violation of international law by his doings."

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This appears to me as just as I should hold it incompatible with the commandments of justice if soldiers would be charged with a criminal responsibility in deciding legal questions, which could not be settled at international conferences and which are hotly disputed in the field of science.

In this connection I should like to mention that the London Pact of 1930 did not adopt from the Root-resolution of 1922 the criminal prosecution for violations of the rules of U-boat warfare. The five naval powers participating in this conference apparently came to the conclusion that the problems of naval warfare cannot be solved by the means of penal law. And this wisdom applies fully to-day.

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I am now coming to the second basic charge of the prosecution, the one of the intentional killing of the shipwrecked It is aimed at Admiral Doenitz alone, not at Admiral Raede The legal basis for the treatment of the shipwrecked for those ships which are entitled to the protection of the London Protocol of 1936, is laid down in the protocol itsel There it reads that before the sinking, crews and passenger are to be brought to safety. This was adhered to on the Ger side, and the difference of opinion from the prosecution concerns only the question already dealt with, which ships were entitled to the protection of the protocal and which were not.

In the case of all ships which were not entitled to the protection of the protocol the sinking is to be considered a military combat action. The legal basis therefore for these cases regarding the treatment of the shipwrecked is contained in the Hague Convention concerning the applicatio of the principles of the Geneva Convention for Naval warfare of 18 October 1907, although it was not ratified by Great Britain.

Accordingyby both belligerents after each combat action shall make arrangements for the search for the shipwrecked, as far as military purposes allow this. Accordingly the principle applied to the German U-boats, to help the shipwrecked of steamers sunk without warning, if by doing do

1) the boat would not be endangered and

2) the accomplishment of the military mission would not be prejudiced.

These principles are generally acknowledged. In this connection I am referring to the order of the British Admiralty, for example:

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" No British ocean-going merchantman shall aid a ship attacked by a U-boat."

I further refer to the affidavit of Admiral Rogge according to which in two cases, personnally witnessed by him, nothing was done by a British cruiser to rescue the shipwrecked, because U-boats were assumed to be nearby once correctly so and once erroneously. A self-endangering appears to exist in a higher degree for U-boats in comparison to other types of vessels, as to its special sensitiveness to hits.

Also in the case of the second exception from the rescue duty the prejudice to the military mission the U-boat is subject to special conditions. It has no room to take guests aboard. Its supply of food, water and fuel is limited and each considerable allocation is destructive to its combat-mission. It is further typical for the U-boat that the combat-mission may also call for an unnoticeable attack and therefore exclude the rescue duty.

In order to show here also an opinion about the practice of the opposite side, I quote from the statement of Admiral Nimitz:

" In general US submarines did not rescue enemy survivors if it meant an unusual additional danger for the submarine or if the submarine was prevented from further carrying out its mission."

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In the light of these principles I will briefly consider the measures of rescue by U-boats until autumn 1942. The basic order was issued by the Naval Warfare Command on 4 October 1939 and ordered rescue whenever possible from the military standpoint. This was temporarily limited through the Standing Order for War 154. This order, issued in December 1939 applied to the few submarines which at that time were operating directly below the English coast. It may be seen from the order itself that every paragraph deals with combat in the presence of enemy forces for security purposes. The last paragraph also deals only with this battle-situation and serves the warranted purpose of protecting the submarine-commanders from the dangers to which, under the existing circumstances they exposed their boats through rescue-measures in every case. When after the Norway-campaign the activity of the submarines gradually shifted into the open Atlantic, this order became outdated and was cancelled in the fall of 1940. In the time that followed the German submarine commanders enacted rescue measures whenever they could assume such responsibility from the military standpoint. This is known to the Tribunal from numerous special examples cited here which were contained in the statements of submarine commanders submitted here as well as in the war-diaries.

This situation was changed through Admiral Doenitz's order of 17 September 1942 in which he did forbid rescue measures on principle. The decisive sentences are:

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"The rescue of members of a sunken ship is not to be attempted. Rescue is contradictory to the most primitive requirements of warfare which are the annihilation of enemy ships and crews."

It has been disputed by the prosecution that this actually prohibits rescue. It looks upon this order as a hidden provocation to kill the shipwrecked, and it has gone through the press of the world as command for murder. If any accusation at all has been refuted in this trial, then it seems to be this contemptible interpretation of the order mentioned above.

How was this order brought on ? Beginning with June 1942 the losses of German submarines through the allied airforce rose by leaps and jumped from monthly average of 4 - 5 up to 10, 11, 13, during the first half-year of 1942 up to finally 38 boats in May 1943.

Orders and measures were chasing each other from the Command of submarine warfare in order to counter these losses. They availed nothing and every day brought fresh reports of air-attacks and losses of submarines.

This was the situation when on 12 September it was reported that the heavily armed British troop-transport "Laconia" with 1500 Italian prisoners of war and an allied crew of 1 000 men and some women and children aboard had been torpedoed. Admiral Doenitz withdrew several submarines from current operations for the purpose of rescuing the shipwrecked and thereby no difference was made between Italians and Allies. From the very start the danger of enemy air attacks filled him with anxiety. While the submarines

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during the following days devotedly rescued, towed boats, supplied food etc. they received no less than 3 admonitions from their commander to be careful, to divide up the shipwrecked and at all times to be ready to submerge. These warnings were of no avail. On 16 September one of the submarines with a red cross flag laid out, was attacked and considerably damaged by an allied bomber while towing life-boats, one of which was hit and caused losses among the shipwrecked. Following this report the commander sent 3 more radio messages with the order in case of danger to submerge immediately and under no circumstances to risk their own safety. Again without avail. In the evening of this day, 17 September 1942 the second submarine reported that during its rescue action it had been taken unawares and was bombed by an airplane.

Notwithstanding these experiences and in spite of the explicit order from Fuehrer-Headquarters to risk no boats under any consideration, Admiral Doenitz did not stop the rescue-action but had it continued until the shipwrecked were taken on by a French warship sent to their rescue.

But this incident was a lesson. Due to the enemy air-scout activity over the entire sea-area, it simply was no longer possible to carry out rescue-measures without riskin the submarine. It was useless to again and again give orders to the commanders to do rescue work only if their own boat was not endangered thereby.

H1243-0065



Earlier experiences had already shown that, for their human desire to render aid had led many commanders to under estimate the dangers from the air. But it takes a submarine, with the deck clear, at least one minute to submerge on alarm while an airplane can cover 6 000 m in that time. This means practically that a submarine engaged in rescue-action when sighting a plane has not time enough to submerge.

These were the reasons which caused Admiral Doenitz directly after the close of the "Laconia" - incident to forbid rescue-measures on principle. The formulation was motivated by the endeavour to preclude the commander's discretion and to suppress every thought of estimating the danger of air-attack in the individual case and then according to the occasion still do rescue-work.

It is difficult to judge the actual effects of this order. From 1943 on about 80% of the boats were fighting against convoys where even without this order rescue-measures would have been impossible.

Whether or not one or the other of the commanders would have, without this order, risked it once more to concern himself with the life-boats, nobody can tell with certainty. As is known there was the order since the middle of 1942 if possible to bring in as prisoners captains and leading engineers. During the almost 3 years of war which followed this order was carried out not even a dozen times which proves how high the commanders themselves estimated danger to their boats in rising to the surface.

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On the other hand, nothing was more distressing for the crew of the torpedoed ships then to be taken aboard a U-boat. Because they knew exactly that their chance of being rescued was much better in a lifeboat then on a U-boat which, with a probability of 50 and more percent, would not return to its base. I therefore together with Admiral Godt arrive at the conclusion that the Laconia order may have cost the life of some Allied seamen at the same time as it may have saved the lives of others. As this may be, in the face of the enormous losses through the enemy air force the order forbidding rescue was justified. It corresponded completely with the basic idea of the precedence of the own vessel and of the own task, as prevailing in all navies; a principle which I believe I have proven as commonly valid in view of existing British and American orders and practices.

How then does the prosecution arrive at the conception of seeing in this order an "order to murder"? Its origin is the discussion between Hitler and the Japanese Ambassador Oshima in January 1942 in which Hitler proposed an order to his U-boats to kill the survivors of sunk ships. This announcement as the prosecution infers, Hitler doubtless made good and Admiral Doenitz had been carrying it out by the Laconia order.

Actually on the occasion of a lecture on U-boat problems which both Admirals had to give in May 1942, the Fuehrer suggested proceeding actively against the ship wrecked in the future, that is, to shoot them. Admiral Doenitz immediately rejected this sort of action

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as thoroughly impossible and Grand Admiral Raeder unqualifiedly concurred with him. Both admirals specified the improvement of the torpedos as the only permissible course of raising the losses among the crews. In the face of the opposition of both admirals, Adolf Hitler dropped his proposal and following this lecture there, no order whatever was given concerning shipwrecked, let alone concerning the killin of the shipwrecked by shooting.

The destruction of the crews through improved action of the torpedos is an idea which for the first time appeared in this discussion of May 1942 and which returns in later documents of the naval warfare command. I am therefore to express myself, about the legality of such tendency: According to classical international law the destruction of combatants was a legal goal of war actions but not of non-combatants. (x) In view of the development of the last wars one may be doubtful whether this classical theory still has any validity. I am regarding the hunger blockade as the first important infringement upon this theory, which, by cutting all food supply, was aimed at the civilian population, therefore the non-combatants of a country, the victims of which during the world war were estimated at 700,000 people.

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(x) Not always recognized by British authors. Compare for example A.C. Bell, A History of the Blockade of Germany etc. London, 1937, page 213. The assertion that civilians and armed combat groups were treated as uniform combat groups only since 1914, is one of the most ridiculous statements ever made.

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(x) Although this blockade was frequently acknowledged as inadmissible according to international law, (xx) it was practiced however, and therefore it means breaking with the principle of protection for non-combatants from war measures. (xxx)

The second great change was brought on by the air war. I do not wish to discuss in detail the unsolvable question of who had started, but only state the fact that the air war, at least in the last two years, was aimed against the civilian population. If in dozens of attacks on residential quarters of German cities after an attack thousands or tens of thousands of civilians were among the victims and only a few dozens or a few hundreds of soldiers, then nobody can assert that the civilian population was not the goal of the attack. The mass dropping of explosives and fire bombs on entire areas does not tolerate a doubt and the use of the atom bomb has produced the final evidence thereto.

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(x) Grenfell, The Art of the Admiral, London 1937, page 45,

"By the early part of 1918, the civil population of Germany, was in a state of semi-starvation, and it has been calculated that, as a result of the blockade, over 700,000 Germans died of malnutrition."

(xx) see also note of protest by the Sowjet government to the British ambassador of 25 October 1939, printed as Nr. 44 in "Documents to the Law of Naval War Fare", Volume I, published by the Chief Command of the Navy.

(xxx) see thereto for example Wheaton's Intern Law, 5th Edition, page 727, Liddel Hart, The Revolution in Naval Warfare", Observer v. 14.4.46.

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In view of the hundreds of thousands of women and children who, in this manner, miserably died in their houses, were buried, suffocated or burnt to death, I am surprised at the indignation of the Prosecution about the loss of about 30,000 men who lost their lives on the battle field or on ships which were armed and carried war material and often enough bombs which were destined for the attack on German cities. Moreover, most of these men died in combat, that is by mines, aircraft and especially in attacks on convoys, actions which also according to British conception were lawful

The German Naval Warfare Command regarded these men as combatants. The British Admirality takes the opposite standpoint in the orders for the merchant Navy, although Oppenheim, the well known British expert of international law, even before the outbreak of the first world war defended the thesis that the crew is to be treated the same as combatants. He points to the century old and especially in England upheld practice to take the crew of merchat ship prisoners of war. He finds this principle confirmed in the 11th Hague convention of 1907 and recognizes the crew of the merchant Navy as potential members of the navy. The legal position in their defence against a war ship is described as "entirely analogical to the position of the population of an unoccupied territory who takes up arms in order to combat invading troops."

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(x) Oppenheim, the Position of the Merchant Ship in Naval Warfare, Periodical on International Law 1914, page 165.

It is well known that this unit is a combat one, according to par.2 of the Hague Convention on land warfare, and without considering whether the individual actually makes use or not of his weapon. Accordingly, Oppenheim refuses to make any distinction, among members of occupying forces, between persons who are enrolled in the enemy navy and those who are not.

If this interpretation was already valid before the first world war, it certainly was unassailable in the year 1942, at a time when there were no more unarmed enemy ships and when the neutrals who happened to enter at all the zone of operations were moving in enemy convoys exclusively, which made them, just like enemy ships, solid members of the military system of the enemy forces. They all had lost any peaceful character and were considered as guilty of active resistance. Active resistance against acts of war is not permitted to any non-combatant in land warfare and results in his being punished as a partisan. And should in the war on sea, a ship's crew be entitled to the combatant's privileges, without suffering any of its disadvantages? Should this crew be permitted to participate in all possible acts of war, even in the firing of guns and underwater bombs, and yet remain non-combatant? Such an interpretation renders illusory the entire concept of a non-combatant. It cannot make any difference, whether or not only a part of the crew has anything to do with the serving of the guns. The ship as an entirety represents a fighting unit and on board a commercial ship more people had actually anything to do with the serving of weapons as on board a submarine.

H1243-0070

These men were trained under military supervision, they served the guns along with gunners of the Navy and the use of their weapons was regulated according to the admiralty's orders. x) The crews of ships were accordingly combatants and thus it was a legitimate aim of hostilities to destroy them by the use of arms.

This explains at the same time the sentence about the destruction of ships a n d c r e w s, which is considered by the prosecution as a particular sign that the "Laconia" order bore the character of a murder-order. There has been enough discussion concerning the meaning of this sentence as an argument for the prohibition of saving. It may, taken out of its context, give cause for misunderstanding. But whoever tries to read the e n t i r e order, cannot misunderstand it. It appears to me as decisive that in accordance with its origin, it as never meant to be a murder-order and has not been interpreted as such by the commanders. This is proven by the declarations and statements of dozens of submarine comanders. In its context, it could not even have been interpreted as a murder-order. In fact, in the next paragraphs it was explicitly ruled that as far as possible certain members of the crew should be brought back as prisonrs.

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x) cf. concerning the carrying out of these orders in world war I Vidaud, Le navires de commerce armés pour leur défense, Paris 1936, p. 63/64 "Les équipages eux-mêmes sont militarisés et soumis a la discipline militaire, ainsi que le capitain Alfred Sheldon appartenant a la réserve de la Marine Royale, a été condamné, le 8 septembre 1915 par le Conseil de guerre de Devonport, pour n'avoir pas attaqué un sous-marin allemand".

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H1243-0072



It stands to reason that one must trust a military command with enough cleverness not to conserve, if it gives such a murder-order at all, a few witnesses of its crime.

Contrary to the Prosecution, the British Admiralty clearly has not believed in such a murder-order. Otherwise it would not have given order to its captains and leading engineers to escape capture by German submarines, by camouflaging as plain sailors while in the life-boats. According to the interpretation by the Prosecution, such an order would indeed have meant that the captain would have been shot by the submarine along with all the other members of the crew.

Further on, the Prosecution has quoted the order to attack so-called "rescue-ships" as an evidence of the intention to kill shipwrecked people. However only the individual who is either in the water or in the life-boat is shipwrecked. A shipwrecked combatant who is again on board a ship is nothing but a combatant and accordingly the legitimate aim of an attack. I have already pointed out, during the hearing of evidence, the shooting-down of German sea rescue planes with intent to kill the rescued airmen, in order to show that the enemy command acted according to the very same interpretation.

H1243-0073



I shall enter as shortly as possible into particulars of the deposition of witnesses, on which the Prosecution tries to base its interpretation of the "Laconia" order. In my opinion, the deposition of first naval lieutenant H e i s i g , as made here before the tribunal, is irrelevant. His former affidavit is wrong and we know why, from the witness W a g n e r . Here, before the Tribunal, Heisig has explicitly denied that in Great-Admiral Doenitz's address to the cadets of the submarine school in September 1942 there has been any question that shipwrecked people should be shot at. Rather has he personnally drawn a conclusion out of the words that totalitarian war must be waged against ship and crew, and by the reference to bomb war. His interpretation may be explained by the fresh impression of the bombing of Luebeck, which he had just experienced. The other listeners did not share this interpretation, in fact, they did not even think of it. This is evident according to the deposition of 3 persons who have heard the address. The further assertion of Heising, that an officer unknown to him had taught him, on an unknown occasion, that one should order, the men below deck, when exterminating shipwrecked people, I consider as an improvisation of his phantasy, which appears to be easily excited. If such had really been the case, then such astonishing an occurrence, which would have been in contradiction with all educational principles of the navy, would have made such an impression on a young officer, that he would have conserved some recollection of the full circumstances of such an instruction.

H1243-0074



The testimony of Korvetten Kapitaen (Ltn. Comm.) Moehle must be taken much more seriously. Because he had - there is no doubt about it - at least hinted to a few submarine commanders that the "Laconia" order demands or at least approves of the killing of shipwrecked. Moehle received this interpretation neither from Admiral Doenitz himself, nor from the chief of staff, nor from the first assistant, Fregatten Kapitaen (Commander) Hessler, that means from none of the officers who alone would have been authorized to transmit such an interpretation to the chief of a flotilla. How Moehle actually arrived at this interpretation has not found any explanation by the trial in my opinion. He maintains: by the fact that Korvettenkapitaen (Lt. Com.) Kuppisch from the staff of the BdU (Commander of the Submarines) had told him the story of "U 386", a boat, the Commander of which had been reprimanded for not having shot Allied airmen drifting in a rubber boat. This explanation of Moehle cannot be correct. It is proven beyond any doubt by the war diary and by witnesses that the commander of "U 386" had been reprimanded because he did n o t take on board the airmen concerned and brought them back. The whole affair with "U 386", furthermore, took place a year after the Laconia incident in September 1943 and Korv. Kapitaen Kuppisch who was supposed to have told it had already been killed in action as U-Boat commander in August 1943.

It is not for me to discuss how Moehle actually came to give his instruction about the "Laconia" order.

H1243 - 0075



One thing at any rate has been proven, Admiral Doenitz and his staff had not caused this briefing to be given nor did they know anything about it. Considering the frequent personal contacts between the U-Boat commanders and the staff of the Commander of the U-Boats this can only be explained by the fact that the few commanders who Moehle thus briefed did not take his words seriously.

Is Admiral Doenitz now responsible for this interpretation of the Laconia order, given by Moehle? Criminal responsibility presupposes in the first place some kind of guilt, i.e. the possibility to foresee the result. Considering the close contact with his flotilla chiefs and commanders, for whom alone the Laconia order was intended, Admiral Doenitz could not foresee that a flotilla chief could give such an interpretation to that order without making any attempt for clearing it up with the commander of the U-Boats. Such a conduct is beyond anything that could reasonably be expected. Therefore, any guilt is excluded. Criminal responsibility requires another criterion, namely results must be proved. This also is entirely lacking. The prosecution has not even mad a serious attempt to prove that one of the commanders, briefed by Moehle i that direction, actually shot once at shipwrecked.

As far as we are informed such a case happened only once in this war, in the case of Kapitaen-Leutnant (Ltn.sen. grade) E c k. It is significant that this case was not presented by the prosecution but by the defense.

H1243-0076



The conduct of Eck has nothing whatsoever to do with the Laconia order as the prosecution wants it understood. It was not concerned with the destruction of human lives but with the removal of wreckage and floats from which the Allied airplanes could deduce the presence of a German U'boat in this area. For this conduct two of his officers together with him have been condemned to death and hereby punished with a severity which will not be understood any more in normal times.

The two cases, presented by the prosecution, in which shipwrecked allegedly has been shot at are so obviously unsuitable for proofing this accusation that I need not deal with it any further. The testimony about the sinking of the "Noreen Mary" bears the stamp of phantasy in various points and, in the case of the attack on the "Antonico", the intention to destroy shipwrecked is out of question because all was over in 20 minutes and the night was dark.

I was in the fortunate position to present to the Tribunal a compilation of the Naval Warfare Command concerning a dozen cases in which Allied forces had allegedly shot at German shipwrecked. It appears to me that every one of these instances is better than that of the prosecution and some appear rather convincing. I value therefore all the more the sober attitude taken up by the Naval War Command of these cases when giving their opinion on these cases to the Fuehrer's Headquarters. It namely points out that

1. part of the incidents occured during combat operations

H1243-0077



2. shipwrecked, swimming in the water, might easily believe that a miss on other targets is aimed at them.
3. so far no written or verbal order by any command for the use of arms against shipwrecked had been traced.

I can only request that these principles are applied also to the incidents, presented by the prosecution.

In the same written opinion to the Fuehrer's Headquarters the Naval Warfare Command rejects reprisals by destroying enemy shipwrecked; that was on 14 September 1942, 3 days before the "Laconia order". As the latter came to the knowledge of the Naval Warfare Command as a wireless order , it would doubtlessly have been cancelled in accordance with the opposite view point just expressed to Fuehrer's Headquarters, if it had been understood as an order for the shooting of ship-wrecked.

And now I am coming to the positive counter evidence against the opinion of the prosecution. It consists in the first place of the number of the rescued allied sailors. It amounted, according to a survey of the British Minister of Transport in 1943 to 87% of the crews. Such a result is simply not compatible with an order for destruction.

Further on, it has been established that Grand Admiral Doenitz in 1943, that is a f t e r the Laconia order, rejected all considerations of actions against shipwrecked.

Ina written opinion given to the Foreign Office on 4 April 1943 a directive to the U'boats to take action against life boats or shipwrecked was considered unbearable by the Naval Warfare Command, as it was against the innermost feeling of every sailor.

H1243 – 0078



In June 1943 the Grandadmiral, when receiving reports from Lieutenant Commander Witt about British aviators shooting at the shipwrecked of submarines most decidedly rejects the idea to attack the foe who has become defenseless in combat it was incompatible with our principles of warfare.

Summing up I am convinced that the assertion of the prosecution that German submarines had received an order to murder the shipwrecked has been strikingly disproved. The Grandadmiral Doenitz stated here that he had never allowed to endanger the spirit of his submarine men by mean acts. With losses from 70 to 80 % he could only replenish his troops with volunteers, if he kept the fight clean, inspite of its being tough. And if the Tribunal remembers the declaration of the 67 commanders in British captivity, it will have to admit that he created a bearing and a spirit which survived the defeat.

I have endeavoured to present to the Tribunal the most important facts and several legal considerations regarding naval warfare, so as to clarify the most important problems discussed here from the point of view of the defense.

The problem concernsthe examination of the behaviour of admirals in naval warfare and the question of what is permissible according to international law is most closely connected with what is necessary according to the military standpoint. I therefore, in examining this point of the indictment deeply regret that the Charter of this Tribunal deprives the accused officers of a privilege, guaranteed them by the Geneva Convention.

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i.e. the passing of judgment by a military tribunal making use of the laws and regulations applicable to its own officers. According to article 3 of the Charter I am not allowed to question the competency of this tribunal. I can therefore only request the Tribunal to make up for the unfairness that I see in the above mentioned article of the Charter, by applying the same standards where military evaluation and moral justification of actions of these German Admirals is concerned, as the Tribunal would apply to Admirals of their own countries. A soldier, due to his practical knowledge of procedure in warfare, not only of the part of his own country but also of the adversary , is keenly perceptive of the dividing line between combat and war crimes. He knows that the interpretation of international law concerning what is allowed or forbidden in naval warfare is decisively governed by the interests of his country. An insular power like Great-Britain having long and sensitive sea lanes and a strong surface fleet has always looked at these questions from a different angle than the continental powers. The attitude of the United States, from the renunciation of submarine warfare by the Root-resolution of 1922 to the unrestricted submarine warfare against Japan in 1941 reveals how a change in strategic position entails also a change in legal evaluation. No one can know to what degree the development of airforces and the efficacy of bombs will increasingly force navies under water and render obsolete all previous conceptions of submarine warfare. (x)

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(x) comp.e.g. "Submarines in the Atomic Era" in New York Herald Tribune, European Ed., 27 Arpil 1946 , p. 2

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For a naval-officer these are obvious reflections and they should prevent a man of law from settling controversial questions of law and policy pertaining to naval war at the expense of those whose professional duty it is to direct navies.

In the first world-war German submarine war was accompanied by a storm of indignation. It seems significant to me that the English historian Bell judges in these very days, in a paper intended only for official use of the Foreign Office, as follows the right to such indignation:

> "It is an old rule of military honor never to belittle the deeds of an enemy who has put up a stiff and brave fight. If this rule had been followed in England, the public would better appreciate the place which the war between submarines and commerce will occupy in the history of strategy and of the war. It is unfortunate that the cries of terror as well as the unseemly insults of journalists were repeated by responsible people with the result, that the slogans piracy and murder entered the vocabulary and have engendered the corresponding feelings in the hearts of the people". (x)

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(x) A.C. Bell, Historical Section, Committee of Imperial Defense, A History of the Blockade of Germany and of the Countries associated with her in the great war 1914-1918.
Before the introduction is a notation: This history is confidential and for official use only. Quoted from the German edition by Boehmert, The English Hunger Blockade in the World War, Essen 1943.

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I now am to treat further the other points of the indictment against Grandadmiral Doenitz which are not concerned with naval-war. To begin with there is the charge of preparation of aggressive wars. It is known, how much this very accusation, is being contradicted by the professional officers of, probably all allied countries. In answer to such attacks in public Justice Jackson formulated for the press (4th December 1945 Stars and Stripes, European Ed., vom 5 December 1945,) the ideas of the prosecution regarding this subject as follows:

> "I have made it clear that we do not prosecute these militarists because they served their country, but because they dominated it and lead it into war. Not because they conducted the war, but because they have been driving to war."

If this standard is used to weigh the charge, then, for the defense of Grandadmiral Doenitz against the charge of preparing aggressive wars, I need only point to the result of the evidence. At the beginning of the war he was a relatively young commander, his only task was the training and instruction of submarine crews, he did not belong to the General Staff in the meaning of the indictment and did not participate in any of the addresses which were presented here as proof of war intentions. The charge that he had advocated the occupation of submarine bases in Norway is likewise disproved.

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The same applies to the allegation, that in 1943 he had proposed an attack upon Spain, in order to capture Gibraltar. The conquest of Gibraltar against the will of Spain was absolutely impossible and out of question during the entire War and especially so in 1943.

For Germany the war had reached the stage of defense, yes even of dangerous setbacks on all fronts, at the time when Admiral Doenitz was appointed Supreme Commander of the Navy on 1 February 1943. This fact may be significant for the participation in the so-called conspiracy. The prosecution is not very clear about the precise moment at which they want to fix the beginning of the responsibility of participation. In the indictment of individuals (app. A of the Indictment), intimate connection with Hitler since 1932 are mentioned. This, however, is ostensibly an error. Admiral Doenitz became acquainted with Hitler only in the fall of 1943 on the occasion of submitting a military report and in the following years talked to him briefly and always only about military problems altogether 8 times and never alone. Since, aside from this fact, the defendant never belonged to any organization which is accused of conspiracy by the prosecution, I see no connection of any kind to this conspiracy prior to 1 February 1943.

The more important is the question of retroaction for joining the conspiracy as has been illustrated by the British prosecutor by the example of the railroad assassins. This idea of guilt, retroactive on past events is very difficult to absorb for the German Jurist. The continental concept of law is reflected by the formulation of Hugo Grotius:

"To participate in a crime a person must not only have knowledge of it, but also the opportunity to prevent it." (x)

Considering that the entire legal concept of the conspiracy represents a special creation of Anglo-Saxon justice in our eyes, than this applies even more so to the retroaction of the so-called conspiracy. A judgment laying claim to international validity, one which should be understood by the peoples of Europe and especially by the Germans, must be based upon generally recognised principles of law. This, however, is not the case regarding a retroactive guilt.

To what extent such a legal construction may seem purposeful in combatting certain typical crimes, they seem to me entirely inapplicable to the review of events such as are being discussed here.

Admiral Doenitz became the Supreme Commander of the Navy in the course of a normal military career, entirely free of politics. The appointment was based upon the proposal of his predecessor, Grand Admiral Raeder, for whom the proven abilities in the direction of U-boat warfare alone were decisive. In acceptance of the appointment was not required just as little as on the occasion of the appointment to any other military position. Admiral Doenitz entertained the only thought, as any officer might well have done in a similar position,

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(x) Hugo Grotius, De iure pacis ac belli, Book II, vol.XXI par. 2. " To participate in a crime a person must not only have knowledge of it but also the opportunity to prevent it."

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that is, the question whether he would be equal to the task and whether he could accomplish it in the best interest of the navy and of the people. All other considerations, which the prosecution apparently expected of him during this period, namely the legitimacy of the Party program and of the policy of the Party from 1922 on, as well as of the German internal and foreign policy since 1933 can but be fictions; they have nothing to do with the facts. Fictions of such nature are not limited by time nor by reality. Is the responsibility for past measures, on taking over a high position to extend only to acts of the present cabinet or is it to extend to acts of former cabinets amd up to what period? Is it to include internal and foreign policy of one's own country or also of those of one's Allies? Such considerations are logical and cannot be refuted, however, they lead to unacceptable results, and show the impracticability of the idea of retroaction regarding the so-called conspiracy.

Only to measure by exact standards the participation in such a conspiracy is difficult enough, if events - not of a criminal, but of a military and political nature are involved Of what meaning are such concepts as "voluntary accession" and "knowledge of the common plan" when in times of the greatest danger an officer assumes the task to prevent the collapse of the sea-warfare?

Even the prosecution seems to realize this. For, corresponding to their general idea, they attempt to link Admiral Doenitz with the conspiracy in a political way. This is accomplished by the assertion, that he became a member of the Reich-Cabinet by reason of his appointment to the Supreme-Command of the Navy.

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This allegation is based upon the decree, whereby the Commanders in Chief of the Army and of the Navy were invested with the rank of Reich Minister and upon the order of Hitler were to participate in the Cabinet meetings.

It is evident that one is not actually a Reich Minister merely by being invested with the rank of Reich Minister . Also he is not a member of the Cabinet, if one is only permitted to participate in it upon special orders. This implies exactly, that he was only to be consulted on professional problems, but never had the authority to gather information about other departments. One can not, however, speak of a political task and consequently of a political responsibility without the existence of such an authority. For an activity as a Minister, any legal basis is lacking. According to the German compulsory service law there existed for the entire Wehrmacht but one minister, the Reich War Minister. This position remained unoccupied after the resignation of General Field Marshal v.Blomberg . The business of the Ministry was conducted by the Chief of the High Command of the Wehrmacht. A new Ministry was not created, neither for the Army nor for the Navy. The Commanders in Chief of the Army and of the Navy therefore would have had to be Ministers w i t h o u t p o r t f o l i Since however they headed a department, namely the Army and the Navy, such an appointment would have constituted a contradiction to all usages of the state law. The task to countersign such laws, in which the minister participates within his jurisdiction, is to be considered as the basic symbol of all ministerial activity.

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There is not a single law, which has been countersigned by the Supreme Commander of the Navy. I have shown this to the Tribunal by the example of the Prize laws. That is to say, that even by and rather because of taking into consideration of the legal standards of a democratic system, the Supreme Commander of the Navy cannot be ddesignated as a member of the Reich Cabinet, because he lacked all authority of participation in legislative acts and every collective responsibility for policies assumed. His task was and remained a military one even though, for reasons of etiquette he was put on an equal basis in rank with other Reichministers.

The Prosecution realized that a Reich Government in the constitutional sense no longer existed during the war and consequently states that the actual governing was carried out by those, who participated in the discussions of the situation in the Fuehrer Headquarters.

As all witnesses examined here, stated, it was dealt here with events of a purely military nature, where incoming reports were presented, military measures discussed and military orders issued. Questions of foreign policy were mentioned exceptionally only, if they had any connection with military problems; they were however never discussed and no decision was rendered on them in these Fuehrers conferences on the situation. Internal policy and the security system was not on the plan for discussion at all. Insofar as non-soldiers participated, they were attendants who gathered information for their respective departments. The SS Reichsfuehrer or his deputy were present for the Command of Waffen SS and during the last year of war also for the reserve Army.

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The Grand Admiral always participated in these Fuehrer Conferences when he was at the Fuehrer's Headquarter. Notes, taken down by whoever accompanied him on all these meetings and discussions of the Supreme Commander are all in possession of the prosecution . As the prosecution has not presented a single one of these notes, from which it would appear that the Supreme Commander participated in reporting on or in decisions of affairs of political nature, one can assume that such notes do not exist. Thus the testimony of witnesses has been confirmed, according to which the Fuehrer Conferences had nothing to do whatever with governing in a political sense, but were an instrument of purely military leadership.

Therefore an overall responsibility of the Grand Admiral for all events that happened and occurred since 1943, and which in the course of this trial have been denoted as criminal, does not exist. Consequently I shall deal with those individual allegations only, by which the prosecution tries to directly connect Admiral Doenitz with the conspiracy. To proceed on that way , I believe I am the more justified, as a short time ago the Tribunal denied me the right of cross examination of witnesses in the Katyn case with the argument that no one was accusing Admiral Doenitz in connection with the Katyn case. I conclude herefrom that, at any rate in the eyes of the tribunal, he is accused of such cases only, wherein he allegedly directly participated.

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To begin with, this applies to the Führer's order for the extermination of sabotage commandos dated 18 October 1942. The prosecution has tried to establish that this order had been expounded to Admiral Doenitz in detail, together with all possible objections, shortly after his assumption of the position of commander-in-chief of the navy. It has failed to establish such a claim. In fact, Doenitz as he himself admits did read or had explained to him the order in question, in fall 1942, in his capacity of commander of submarines, and in the same form in which the front commanders received it. I do not wish to speak here of the circumstances which led to objections against this order on the part of the OKM. Indeed, not all these circumstances could be discernible to one who received this order at the front. For such a one it was a matter of reprisal against saboteurs who were only externally soldiers but did not fight according to the regulations which are binding on soldiers. Whether such reprisals were admissible at all according to the Geneva Convention, and to what extent, was not capable of being judged nor, did it fall within the competence of the recipient of the order. Any superior officer, at any rate, has probably recognized that the order not to grant any pardon and to deliver such persons, in certain cases, to the SD, was in itself an offense against the rules of war. However, as the essence of any reprisal is to avenge a wrong on the part of the enemy with wrong on one's own part such recognition does not prove anything concerning the legitimacy or illegitimacy of the reprisal order. If no one but the government of the state is competent to order reprisals, then hundreds or thousands of German officers cannot be required today to

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consider themselves likewise competent, and to presume to verify orders whose actual and legal bases were entirely unknown to them. In this case the principle prevails, at least for the front commander, that the subordinate may, when in doubt, rely on the order as given. )x)

Now, the prosecution seems to be of the opinion that Admiral Doenitz a few months later, when he had become commander in chief of the Navy, had the opportunity and also the obligation to inform himself as to the bases of the order issued by the command. This requirement fails to recognize the duties of a commander-in-chief of the navy. He has to wage naval war. The whole German naval war, especially the submarine war, was in the spring of 1943, owing to huge losses inflicted by the enemy air force, on the verge of collapse. These were the worries with which the new commander-in-chief had to cope in addition to an abundance of new problems concerning the navy which were coming up. How can one require such a man as in the quietest of times, to cope with an order of remote date, which had nothing whatever to do with naval warfare. On the contrary, a special paragraph explicitly excluded prisoners taken during naval operations.

I must insert something concerning the circumstances of giving command. The naval units were under the control of the naval command only in those matters which belonged to the duties of the navy, i.e. naval warfare and artillery coast defense.

(x) Hugo Grotius , De jure pacis ac belli, Book II, chap. XXVI, par 4. " He can belive that in a matter of doubt he must obey his superior.

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Concerning so-called territorial questions they were not subordinate to the naval warfare command to the Wehrmacht commander of the theater of war in which their basis was established. Orders concerning such measures of war on land were given without any collaboration on the part of the naval warfare command and their execution was not reported to it. Just as hardly anyone can think seriously of holding a general responsible for the German submarine war, just so little in my opinion does it seem justified to hold an Admiral responsible for orders given in land warfare.

Such a routine for territorial duties also explains the complete ignorance of the Admiral of the fleet and of his colleagues in the naval warfare command, about the delivery to the Security Service of the crew of the Norwegian torpedo boat TB 345 after their capture by units of Admiral von Schrader. As demonstrated by the depositions of the witnesses and the records of the Oslo war crimes court, the naval warfare command received only a combat report concerning the capture of the vessel and the number of prisoners. Any further details, the discovery on board of material for sabotage and of civilian suits, the finding of sabotage orders and the treatment of the crew as saboteurs according to the order given by the command, were dealt with as a territorial matter between Admiral v. Schrader and the Wehrmacht commanding officer for Norway. The decision concerning the fate of the crew came from the Fuehrer headquarters in reply to a question of Gauleiter Terboven. Not only there is no evidence that the naval warfare command took part in these territorial questions, but

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this must be considered as refuted according to the evidence submitted and of the chain of command which has been demonstrated.

I consider as the second attempt of the prosecution to establish a participation in the so-called conspiracy for committing war crimes, the submitting of Admiral Wagner's record concerning the withdrawal from the Geneva convention, in spring 1945. According to this, the Fuehrer pointed out in a discussion of the situation on February 2nd, that the enemy propaganda concerning the good treatment of prisoners of war clearly influenced the units, fighting on the Western front, and that many cases of going over to the enemy were being reported. He ordered an examination of the question of a withdrawal from the Geneva convention. Thus he wanted to convince his own soldiers that they could no more rely upon good treatment as prisoners of war, and to create accordingly a reaction against the enemy propaganda. Two days later Hitler reverted to this idea, but now another reason was put into the foreground. He defined the enemy warfare in the East and the bomb attacks on the German civilian population as a downright renunciation of international law by the enemy, and desired, on his side, to free himself from any obligations by withdrawing from the Geneva convention. Once more, he wanted the Wehrmacht's opinion and addressed himself directly to the Grand-Admiral. The latter did not answer. The point of view of the military leaders on this matter was unanimously in the negative.

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On the next day, and preceding the discussion of the situation, a ten minute's conversation took place between Grand-Admiral Doenitz, Colonel-General Jodl and Ambassador Hewel; in the course of this conversation Doenitz expressed his negative attitude. According to the notes of Admiral Wagner he said that

> "it would be better to take the measures considered to be necessary without previous announcement and to save at any rate one's face before the world".

The prosecution perceives herein the readiness and the design to expose hundreds of thousands of Allied prisoners of war to arbitrary murder.

Admiral Doenitz himself does not remember any such sentence. This is not surprising, as there is no question of a r e c o r d , but of a c o n d e n s a t i o n of a long conversation into 4 sentences. The precise wording was done the day after the conversation only, by Admiral Wagner. The latter declares himself that the Grand-Admiral had disapproved of any "wild measures" which were apt to put us in the wrong from the beginning, and had considered as permissible only such measures which, according to the enemy's attitude, were actually justified and imperative in each case. As Wagner, the author of the transcript, should know himself best what he meant with this, I personnally cannot add anything to this declaration. The interpretation of the prosecution is not supported by any other circumstances. There was no question at all of keeping any measures secret. They would have to be made known, no matter whether they were meant to deter our own deserters or to make reprisals.

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Wagner's note does not mention anything about any kind of concrete measures to be taken, and all witnesses that were present at this "Fuehrerlage" (discussion on the situation in Hitler's H.Q.) state that not a word was spoken about that subject. The idea to kill prisoners of war could therefore, not possibly occur to any of the participants in the discussion, noted down by Wagner.

Now it came to light, by the statements of the defendants Ribbentrop and Fritzsche, that Hitler evidently, besides the action concerning the generals, had prepared another one in which only Goebbels and Himmler were to participate and which by chance came to Ribbentrop's knowledge. In this action the shooting of thousands of prisoners of war seems to have been taken into consideration as a reprisal against the air attack on Dresden. Hitler, very wisely, did not utter a murmur indicating such ideas to the generals. This action was not taken up any further and reprisals were not executed.

And now I come back to facts. It is a fact that Admiral Doenitz disapproved of the leaving the Geneva-Convention and that Hitler, owing to the attitude of all military leaders, who clearly opposed it, did not follow up the idea any more. It is a fact that no measures violating international law were taken by the German as result of the remark criticized by the prosecution and it is lastly a fact, that the enemy-sailors who were made prisoners were grouped in a prisoner of war camp of the navy and that they were treated in an exemplary way to the last day of the war.

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Who in his own department behaved as Doenitz did with regard to prisoners of war of the navy, may reasonably not be charged with having thrown over board all standards of law and morals with regard to prisoners of war. As certified by an English Commander: When the prisoner-of-war-camp of the navy was taken over by British troops all prisoners without exception said that they had been treated with "fairness and consideration". The Tribunal will no doubt appreciate such unanimous statements after what in these proceedings otherwise has been heard of failures in the treatment of prisoners of war and not only on the German side.

If I now occupy myself with the conspiracy to commit crimes against humanity, I should like to draw your attention to the fact, that Admiral Doenitz is not accused by article 4 for directly having committed crimes against humanity. In the individual accusation not even participation in the conspiracy to commit crimes against humanity was contended. That, I would say, is the admission that there is in fact no relation between his activity and the crimes against humanity spoken of by the prosecution. Nevertheless the Prosecution has presented some documents which should prove a participation in the responsibility for certain crimes against humanity.

In judging these documents the most important question is again and again: What did Admiral Doenitz know of these crimes?

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To this subject I should like to clear up one point. During the whole war he lived at his staff-headquarters, first on North-Sea coast, since 1940 in France, and in 1943 for a short time in Berlin and then in the camp "Koralle" near Berlin. When he was at the Fuehrer headquarters he lived with the navy staff there. Off duty he associated almost exclusively with naval officers. This may have been a weakness, but it is a fact, which explains the lack of knowledge about certain occurences.

The fact that the defendant forwarded a proposition of the Ministry for armaments to employ 12000 men from concentration camps as workers in the ship-yards proves for the prosecution that Admiral Doenitz knew and approved of the arrest of countless innocent people and their ill-treatment and killing in concentration camps.

He actually knew of course that concentration camps existed and he also knew that, besides the professional criminals, people arrested for political crimes were kept there. As already explained here, the keeping in custody, of political adversaries, for reasons of safety is a mode of acting, executed by all States in times of danger. Knowledge of such an institution can therefore incriminate nobody. However, an unusually high number -- out of proportion with the number of the population -- of political arestees may stamp a regime to a regime of terror. Taking into account a population of 80 million and the 5th year of a grim war, even twice or three times the number of 12000 men mentioned by Admiral Doenitz would not yet be the sign of a regime of terror.

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The prosecution will hardly want to assert this. He has stated here as a witness that the Commander in chief of the navy as well as his collaborators and the overwhelming part of the German people did not know of the abuses and killings that occured in concentration-camps. All that the prosecution put forward against this are assumptions but no proofs.

I will, therefore, to this point only refer to the statement of the then Minister for armaments, S p e e r , according to which the inmates of concentration -camps were much better off than in camp when they worked in industry and that these jobs were much desired. The proposition forwarded therefore did not signify anything inhuman, on the contrary, rather the opposite.

In the same proposition there is a suggestion to take energetic measures against sabotage in Norwegian and Danish ship-yards where 7 of 8 new constructions had been the victims. If needs be the personnel should be entirely or in part replaced by "CC-workers". Because,so it says a sabotage of such dimensions can only be possible if a l l the workers silently condone it. We have here a proposition for security measures in which workers who actively or passively participated in sabotage are kept in a camp close to the shipyard wherby their connection to sabotage agents was to be cut off. I do not believe that juridical objections can be raised against such measures of security.

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According to the practice of all occupation troops even collective punishment measures would be justified in such cases (x)

Actually the proposed measures were never carried out and the prosecution very likely presents them only for the purpose of bringing against Admiral Doenitz a general accusation of brutal attitude towards the inhabitants of occupied territories. For this purpose it even refers to a statement of the Fuehrer at a conference on the military situation in summer 1944, according to which terror in Denmark must be fought with terror. The only part Admiral Doenitz had in this statement was that he heard it and that his companion, Admiral Wagner wrote it down. The Navy had no part in it nor did it take any measures as result of it.

In contrast to this line of evidence submitted by the prosecution I should like to emphasize the attitude which Admiral Doenitz actually showed towards the population of the occupied territories. There is before the Tribunal a survey concerning the administration of justice by the Naval Court for the protection of the inhabitants of the occupied territories against excesses of members of the Navy. The survey is based on an examination of about 2 000 delicts and part of the judgments rendered are given together with circumstances and reason. Judging from that one can fairly say that the Naval Courts protected the inhabitants in the West as well as in the East with justice and strictness that is to say lives as well as property and the honor of women.

(x) cf. Wheaton's International Law, 5th Ed.Page 543/54

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This meting out of justice was constantly supervised by the Commander-in-Chief of the Navy as the highest l gal authority. According to court regulations he was competent for the confirmation of death penalties meted out to German soldiers.

The shortness of time does not permit one to go into detail with these judgments. What is formulated in one of them applies to all: All soldiers must know that also in occupied territory life and property of others will be fully safeguarded. This was the general attitude in the Navy and the severity of the penalties inflicted proves how seriously it was taken.

I need say only a few words concerning the order of spring 1945, in which a German prisoner of war, an N.C.O., was presented as an example, because he had in a prison camp unobstrusively and according to plan had communists liquidated, who attracted attention. As Wagner recalled it was actually the liquidation of an informer. But the facts were camouflaged in the manner mentioned in order not to give enemy intelligence any clue as to the camp and the person of the N.C.O.. That this order in its true principle was capable of being justified cannot be doubted by anyone, in view of the enormous number of political murders which have been committed with the toleration or assistance of governments engaged in the war and the perpetrators of which are today extolled as heroes. I cannot however seriously consider that the unfortunate camouflaged wording could be proof of a general plan to liquidate communists. An order issued for the protection of communists will reveal the true circumstances:

A sergeant had stolen in a hospital blankets which were intended for Soviet prisoners of war and had broken out a dead prisoner's gold teeth. This sergeant was condemned to death by a Naval Court and executed after the sentence had been confirmed by the Commander-in-Chief. Finally the prosecution also established a connection with the Jewish question through a statement in which the Grand Admiral speaks of the "lingering poison of Jewry". Here I wish to say:

Doenitz knew as little of the plan for the destruction of the Jews as he did of its execution. He knew of the evacuation to the Government General of Jews living in Germany. I do not think that this evacuation can be condemned at a time when deportations of Germans on a much larger scale are taking place before the eyes of a world silently looking on. Here too I refer to a sentence of long penitentiary terms against 2 German sailors. Together with some Frenchmen they had robbed French Jews. From the opinion of the court I again quote a sentence which characterizes the general attitude: "That the crimes were committed against Jews does not excuse the defendants in any way".

In the same way it seems to me that the efforts of the prosecution to include Admiral Doenitz in their interpretation of conspiracy by way of the so-called fanatical Nazi have failed.

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He was neither a member of the Party nor was he ever politically prominent until his promotion to Commander in Chief of the Navy. The assertion of the Prosecution that he became Commander in Chief of the Navy because of his political attitude is without any foundation. He had no reason to participate in National Socialism afterwards, because to him, as professional officer, every political activity was forbidden according to the Compulsory Service Law. However, he too, like millions of other Germans, recognized the unique success of Hitler's conduct in social and economic fields and of course also the liberation from the obligations of Versailles which concerned him as soldier especially. Therefore, he served entirely without political activism but in loyalty to the National-Socialist-State when he received his promotion to Commander in Chief.

Therewith two new elements arose in his relations to National Socialism. There was first his personal contact with Adolf Hitler. Like almost everyone else who had personal connection with this man, he too was most deeply impressed. To the respect for the Head of the State, and faith to the Supreme Commander, which the professional officer is trained in, was added the admiration for the Stateman and Strategist. It is difficult to understand completely such an attitude, from the information as conveyed by this trial. I neither feel qualified nor capable to judge a personality like Adolf Hitler. But one thing seems certain, namely that with the art of an expert he

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skilfully concealed the camouflage of the from the human standpoint objectionable traits of character from those of his co-workers to whom he did not dare to reveal this part of his nature. The Hitler with whom the new Commander in Chief of the Navy became acquainted at that time and whom he venerated was therefore entirely different from the one which the world - rightly or wrongly - sees today.

The second new element in the relations between the Grand-Admiral and National Socialism consisted in the fact that in the performance of his military duties he necessarily came in contact with the political authorities of the Reich. Whether he needed more men, more ships or more arms it was in the end always political authorities with whom he had to discuss matters. In order to be successful in his demands it was necessary that all political mistrust be eliminated at the very start. He did this intentionally and demanded the same of his subordinates. To him the Party was not an ideological factor but rather the actual representative of the political power. He was linked with it in the common aim to win the war. For the achievement of this aim he considered it as his ally. But for the advantages which one expects of an ally, one must be willing to make certain sacrifices and to overlook certain faults and to ignore controversies.

The connexion with the Fuehrer, however, and the contact with the Party which were concomitants of his position and of his duties as a Commander in Chief of the Navy, never led him to participate in anything for which he could not assume the responsibility before his conscience. Exactly some

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points of the prosecution prove this. The Fuehrer demanded action against the shipwrecked, Admiral Doenitz rejected it. The Fuehrer was for withdrawal from the Geneva Convention. Admiral Doenitz was against it. He stubbornly and successfull resisted the Party's influence upon the Armed Forces. Thanks to his resistance the National-Socialist educational officers (Fuehrungsoffiziere) did not become political commissars, but were as genuine officers merely advisers to their commander, who retained the sole responsibility of leadership of his unit. The transfer of proceedings against soldiers on political grounds from the military courts to the People's courts (Volksgerichtshof) which had been advocated by the Party, was prevented by Admiral Doenitz until the winter of 1944/45 and afterwards, in spite of a Fuehrer-order, never carried out in the Navy. Thus he never identified himself with the Party and therefore certainly cannot be held responsible for its ideological endeavors or its excesses no more than in foreign politics a government would be ready to assume the responsibility for such things committed by an ally.

I do not by any means want to give the impression that Admiral Doenitz was not a National Socialist.

To the contrary. I want to exactly use him as an example to prove the incorrectness of the thesis that every National-Socialist as such must be a criminal. This Tribunal is the sole instance where authoritative personalities of the allied chief powers are occupying themselves intensively with the last twelve years of the German past. It is therefore the only hope of

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very many Germans for the removal of a fatal error which caused the weaker characters of our nation to become hypocrites and thus prove a decisive obstacle on the road to political recovery.

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When, after these explanations I am entering into particula of the charge that Admiral Doenitz had, out of political fanaticism, protracted the inevitable surrender, then I am doing so because of a particular reason. This charge which does not seem to have anything to do with the indictment before an international tribunal wdghs particularly heavy in the eyes of the German people. This nation truly knows what destructions and what losses it has yet endured in the months from February until May 1945. I submitte declarations of Darlan, Chamberlain and Churchill from the year 1940, in which these statesmen in a critical hour of their country called for desperate resistance, for the defence of every village and of every house. Nobody will conclude therefrom that these men were fanatical National-Socialists. The questioh of Unconditional surrender is, indeed, of such colossal import for a nation, that, in fact, it is possible only after the events to judge whether a statesman who had to face this questioh, did or did not do the right thing. Admiral Doenitz, however, was not a statesman in February 1945, but the supreme commander of the navy. Should he have requested his subordinates to lay down arms at a time when the political authority of the state still considered military resistance as opportune and necessary ? Nobody will demand this in earnest.

To me the question appears to be far more difficult, whether he, whom Hitler esteemed so much should not have had the duty to point out to Hitler with all due clearness the hopelessness of a prolonged resistance.

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Personnally, I would be inclined to affirm such a duty towards his people, if he had himself considered at that time a surrender as justified. He has not done so, and has stated the reasons herefore. Surrender implies stopping the armies and stopping the population. The German army on the Eastern front - still more than 2 millions strong in February 1945 - and the entire civilian population of the German eastern provinces would therefore have fallen into the hands of the Soviet armies and this, in a bitter cold winter month. Admiral Doenitz therefore was of opinion - shared by Colonel-General Jodl - that the human losses occurring in such a manner would have been far greater than those which a protracting of the capitulation until the warmer season should of needs have caused. Only in future years, when more exact evidence concerning casualties of the army and of the civilian population, both before and after the surrender in the East and in the West, will be available, there will be a possibility to judge the objective truth of such an interprdation. But it may yet be said to-day that such arguments were exclusively founded upon a stern consciousness of responsibility for the life of German people.

The very same consciousness of responsibility caused him, after his assumption of the office of head of the state on May 1st 1945, to cease hostilities against the West, but to protract, on the contrary, the surrender to the East for a few days, days in which hundreds of thousands were able to escape in a Western direction. Since the moment, when he got - to his own complete surprise - a political task, he has avoided with an intelligent hand a threatening chaos,

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has prevented desperate acts of masses without leaders, and has assumed responsibility, for the German people, for the gravest action which a statesman can make at all. To come back to the beginning of the indictment, he has not done anything to start this war, but taken the decisive steps to end it.

Since that moment the German nation has learned much what it did not expect, and more than once the unconditional surrender, which the last head of the state has carried out, has been pointed out. It is for the Tribunal to decide whether, in the future, this action will be referred to the binding value of the signature of a man who is being outlawed as a criminal, in front of the whole world, by his very partners in the treaty.

In the beginning of my statement I have referred to the doubts which any trial against war-criminals is bound to induce in the heart of any lawyer. They weigh upon everyone who bears a co-responsibility for such a trial. I could not better mark the task of all the responsible persons than by quoting the words coined by a British attorney about the trials before the German Reich court in the year 1921:

> "The War Criminals' trials were demanded by an angry public rather than by statesmen or the fighting services. Had the public opinion of 1919 had its way, the trials might have presented a grim spectacle, of which future generations would be ashamed. But

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thanks to the statesmen and the lawyers,a public yearning for revenge was converted into a real demonstration of the Majesty of Right and the Power of Law." (x)

May the verdict of this Tribunal be valid in a similar way before the judgment of History.

(x) Claud Mullins , The Leipzig Trials, London 1921.

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